TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 266.

SAMUEL CLARK, GENERAL TREASURER OF THE STATE OF RHODE ISLAND, AND THE STATE OF RHODE ISLAND, APPELLANTS,

vs.

GEORGE M. BARNARD, CHARLES S. BRADLEY, AND CHARLES R. CHAPMAN, ASSIGNEES IN BANKRUPTCY OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED SEPTEMBER 15, 1880.

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1 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Before the honorable Thomas L. Nelson, district judge.

GEORGE M. BARNARD ET AL., COMPLAINANTS,
v.
SAMUEL CLARK ET AL., DEFENDANTS. } In equity.

2 The bill of complaint in this cause was filed in the clerk's office on the ninth day of March, A. D. 1872, and was duly entered at the October term of this court A. D. 1871, and is in the words and figures following, namely:

3 *Bill of complaint.—Filed March* 9, 1872.

To the honorable the judges of the circuit court of the United States within and for the district of Massachusetts, sitting in equity:

George M. Barnard, Charles S. Bradley, and Charles R. Chapman, the assignees in bankruptcy of the Boston, Hartford and Erie Railroad Company, a bankrupt corporation, duly appointed by the district court of this district, bring this their bill against Samuel Clark, of Lincoln, in the State of Rhode Island, the City of Boston, in the State of Massachusetts, and within said district, a municipal corporation, and Frederic U. Tracy, of said Boston, the treasurer of said city.

And thereupon your orators complain and say that said Boston, Hartford and Erie Railroad Company, being chartered by the States of Connecticut and Massachusetts for the purpose of building, acquiring, and operating a railroad from Boston, in the State of Massachusetts, to Willimantic, in the State of Connecticut, and from Providence, in the State of Rhode Island, to said Willimantic, and from said Willimantic, through Waterbury, to the State line of said Connecticut, and thence to Fishkill, in New York, all the railroads aforesaid running easterly and westerly, and having no right to build and maintain the railroad in the State of Rhode Island hereinafter mentioned, the directors of said Boston, Hartford and Erie Railroad Company, without authority from said cor-
4 poration or by law, applied to the legislature of the State of Rhode Island, at the January session thereof, for 1869, for, and obtained from said legislature the passage of, a certain act, being an act entitled "An act in addition to an act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company," by which said Boston, Hartford and Erie Railroad Company was authorized to locate and construct a railroad in extension of their line of railroad by them purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point in their said purchased railroad at or near their freight depot, in the city of Providence, thence running westerly and northerly by a line westerly of the State prison, a little

easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line, and crossing or running near to Leonard's Pond (so called), and thence passing between the villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad; thence continuing to the easterly line of the State, in or near the village of Valley Falls, there to meet and connect with a railroad extending westerly through North Attleborough from the direction of Boston, authorized by the commonwealth of Massachusetts, which said railroad, so authorized by the State of Rhode Island, was to run in a northerly and southerly direction, and, in connection with the said railroad authorized by the State of Massachusetts, was to make a continuous line of railroad between the said city of Providence and the city of Boston.

And the said legislature of Rhode Island, against the remonstrance of the said petitioners, imposed upon the said act a condition precedent thereto in the following terms, to wit: "This act shall not go into effect unless the said Boston, Hartford and Erie Railroad Company shall, within ninety days from the rising of this general assembly, deposit in the office of the general treasurer, their bond, with sureties satisfactory to the governor of this State, in the sum of one hundred thousand dollars, that they will complete their said road before the first day of January, A. D. 1872."

And your orators further say that the said condition was not complied with, and that the aforesaid act of said general assembly never took effect, and was and is wholly null and void.

And your orators further say that after the passage of said act the directors and officers of said corporation, without authority and in abuse of their trust and duty as directors and officers of said corporation, filed with one Samuel Parker, now deceased, but who was then the general treasurer of the State of Rhode Island, a paper purporting to be the bond of said corporation, but without any sureties as required by said act; and furthermore that the said directors and officers of said company, in violation of their duty to the said corporation and the stockholders thereof, and without any authority therefor, wrongfully and fraudulently took of the funds of said corporation the sum of $100,000, and, contrary to their duty, deposited the same with said respondent, Frederick U. Tracy, then and now, as aforesaid, the city treasurer of the said City of Boston; and the said Tracy thereupon gave to said directors and officers a certain paper writing, a copy whereof is hereto annexed, and marked "A," to which your orators crave leave to refer; and your orators are informed and believe, and therefore aver, that said directors and officers of said corporation took the said paper which they had received as aforesaid from said Tracy, and without any consideration and without authority or any warrant or color of law therefor, deposited the same with the said Parker, who received the same without giving any consideration therefor and without any authority or warrant of law, and thereupon held the same to the use of the said Boston, Hartford and Erie Railroad Company.

And your orators further say that the said corporation never accepted the said act and never authorized the directors and officers of said corporation to give the bond required by said act, nor did the stockholders of said corporation ever authorize the said officers, nor had they the power to authorize them, to use the funds of said corporation in the manner

aforesaid, or to deposit the same, directly or indirectly, with the said Parker or with the general treasurer of said State of Rhode Island, or with the said city treasurer of said Boston.

And your orators say further that the by-laws of said corporation require that all notices for the meetings of the said company shall specify the business to be acted on, and that the practice and usage of said company was in accordance with the said by-laws and the requirements
6 thereof, and that in every instance where the stockholders of said company were at any meeting to vote upon any legislative acts, the notices for calling the said meeting and the votes of the stockholders at said meeting, set out specifically the statutes upon which the said stockholders would be required to and did act, with only two exceptions—one in the annual meeting held on the twelfth day of September, for the year eighteen hundred and sixty-six, and one in the annual meeting held on the eighth day of September, for the year eighteen hundred and sixty-nine, all which duly appears by the records of said corporation, to which your orators crave leave to refer.

And your orators further say that at some time after the deposit of said paper A, but less than four months prior to the bankruptcy of the said Boston, Hartford and Erie Railroad Company, as hereinafter set forth, the vice-president and financial manager of the said company, through his agent and counsel, sued out a writ of attachment and trustee process in the supreme court of the said State of Rhode Island, and attempted and undertook to trustee, as the funds and property of said corporation, the said paper in the hands of the said Parker, the general treasurer of the State of Rhode Island, as aforesaid.

And your orators further say that the railroad authorized by said act has never been built, or any part thereof, nor has any work been done thereon, nor has the said State of Rhode Island nor any citizen thereof suffered any damage or loss whatsoever by reason of the passage of said act or of anything done or omitted to be done thereunder; and the general assembly of the said State of Rhode Island considered that the filing of the said paper A with the general treasurer of said State was not a compliance with the terms of said act and a fulfilment of the condition thereof, and subsequently to the bankruptcy of said Boston, Hartford and Erie Railroad Company, as hereinafter set forth, but prior to the appointment of any assignees in bankruptcy of said company, passed an act approving and affirming the taking of the deposit aforesaid as security for the construction of said railroad so authorized as aforesaid by the said State of Rhode Island.

And your orators further say that a petition in bankruptcy against said Boston, Hartford and Erie Railroad Company was duly filed
7 as appears from the records and proceedings in the district court of the United States for this district, on the twenty-first day of October, in the year of our Lord eighteen hundred and seventy, and the said corporation was thereafter adjudicated a bankrupt, and your orators were thereafter duly appointed assignees of the said bankrupt, and that thereupon all the estate, assets, and property of said bankrupt vested in your orators as said assignees, as of the said twenty-first day of October, A. D. eighteen hundred and seventy, by virtue of an assignment duly made to them.

And your orators further complain and say that they thereupon became

entitled, as assignees as aforesaid, to said money so as aforesaid wrongfully by said directors deposited in the hands of the said respondent Tracy, city treasurer of said City of Boston, and by him held as aforesaid to the use of said corporation, and also became entitled, as such assignees, to said paper writing so as aforesaid deposited in the hands of said Parker, general treasurer of the State of Rhode Island, and that said money so as aforesaid in the hands of said Tracy, city treasurer, thereupon was and now is an asset in bankruptcy of the said bankrupt corporation and part of said bankrupt's estate conveyed by said assignment to your orators as such assignees as aforesaid.

And your orators further say that your orators, as assignees as aforesaid, made due application to the State of Rhode Island and the general assembly thereof to deliver to them, as assignees as aforesaid, the said paper writing, and to execute to them, the said assignees, or to cause to be executed to them, such formal transfer of the same as should be needful to enable them, the said assignees, upon presentation of the same to the said respondent Tracy, city treasurer of said City of Boston as aforesaid, to require and obtain from him the payment and delivery to them of said sum of money so as aforesaid deposited with him, which application the said general assembly have not granted, but instead thereof one house of the said general assembly of the State of Rhode Island has passed a resolve authorizing and instructing the general treasurer of the said State of Rhode Island to collect said moneys.

8 And thereafterwards Samuel Parker aforenamed died, and the respondent, Samuel Clark was duly elected and qualified as general treasurer of said State of Rhode Island in place of said Parker, deceased, and said Clark has taken possession of said paper writing, which was found on the decease of said Parker among his official papers, and wrongfully claims to hold the same as general treasurer of said State of Rhode Island, whereas, as your orators are advised and thereupon aver, the said Clark really holds the same without any title thereto as general treasurer of the State of Rhode Island, but in his individual capacity and to the use of your orators as hereinbefore set forth; and your orators further say that the said Clark threatens and intends to present the same to said Tracy, city treasurer of the said City of Boston, and thereupon to demand from him the payment and delivery to him, the said Clark, of said sum of $100,000, the property of these complainants, as assignees as aforesaid, and a part of the assets of said bankrupt estate of said corporation as aforesaid.

And your orators have reason to fear and apprehend that said Tracy, treasurer, will pay to him, the said Clark, the aforesaid sum of $100,000.

Wherefore, and inasmuch as your orators are remediless in the premises in the courts of common law, and can only have relief in a court of equity, to the end therefore that the said respondents may show cause, if any they have, why your orators should not have the relief hereby prayed for, and the said respondents may upon oath answer the premises, and that the said respondent Clark may be decreed to have no right, title, or interest in or to the said paper writing A, or in or to the said money so deposited with the said respondent Tracy, or to any part thereof, and that he may be decreed to assign and deliver over the said paper A to your orators, and may be enjoined and restrained from presenting the same to the said respondent

Tracy, or to the said City of Boston, or from receiving any money or payment whatsoever thereon, or therefor or for any part thereof, or from receiving or holding the said sum of $100,000, or any part thereof, from the said respondent Tracy, or the said City of Boston, and that the said respondent Tracy and the said City of Boston may be decreed to pay over to your orators, as assignees as aforesaid, the said sum of $100,000, with interest thereon, and may be enjoined and restrained from paying the same,
9 or any part thereof, or any money on account thereof, to the said respondent Samuel Clark, the general treasurer of the State of Rhode Island, and that your orators may have such other and further relief as to your honors shall seem meet, and as the nature and circumstances of the case shall require—

May it please your honors to grant unto your orators not only writs of injunction against the said Samuel Clark, and against the said Frederic U. Tracy, city treasurer of the said City of Boston, and against the said City of Boston, enjoining and restraining them and every of them conformably to the prayer of this bill, and also writs of subpœna, to be directed to the said Clark, and the said Tracy, and the said city of Boston, commanding them, and every of them, on a certain day and under a certain penalty, to be and appear before this honorable court, and to stand to, abide, and perform such order and decree therein as to this court shall seem meet, and as shall be agreeable to equity and good conscience.

GEORGE M. BARNARD.
CHARLES S. BRADLEY.
CHAS. R. CHAPMAN.

LOTHROP & BISHOP AND ARTHUR LINCOLN,
Solicitors and of Counsel.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

On this ninth day of March, A. D. 1872, personally appeared the abovenamed George M. Barnard, Charles S. Bradley, and Charles R. Chapman, and made oath that the above bill by them subscribed is true of their own knowledge, except as to matters which are therein stated to be on their information and belief, and, as to those matters, they believe them to be true.

Before me.

FISHER AMES,
U. S. Commissioner.

10 (Copy A.)

TEMPORARY LOANS. CITY OF BOSTON.

$100,000.] [No. 6.

This certifies that, for value received, there will be due from the City of Boston, payable at the office of the city treasurer, on demand after the first day of December next, to the general treasurer of the State of Rhode Island, or order, the sum of one hundred thousand dollars, with interest at the rate of seven per cent. per annum, in current funds.

This loan being authorized by an order of the city council, passed the

ninth day of June, eighteen hundred and sixty-nine, to anticipate the income of the present financial year.

Interest will not be allowed after this note is due.

June 28, 1869.

FRED. U. TRACY, *Treasurer.*

ALFRED T. TURNER, *Auditor.*

NATH. B. SHURTLEFF, *Mayor.*

This cause was thence continued to the May term of this court, A. D. 1872, when the following demurrer was filed, namely:

Demurrer of Samuel Clark.—Filed Sept. 3, 1872.

The demurrer of Samuel Clark, general treasurer of the State of Rhode Island, named as one of the defendants to the bill of complaint of George M. Barnard et al., assignees, against the said Samuel Clark et al.

This defendant, by protestation, not confessing nor acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer doth show that it appears, by the complainants' own showing in said bill, that the said bill is in substance and effect a suit in equity against the State of Rhode Island and Providence Plantations, and that the complainants in said bill have commenced and do prosecute the same in their capacity of assignees in bankruptcy of a corporation which is a citizen of other States of the United States
11 than the said State of Rhode Island and Providence Plantations, inasmuch as it is stated in the said bill of complaint:

First. That they, the complainants, are the assignees in bankruptcy of the Boston, Hartford and Erie Railroad Company, a bankrupt corporation, duly appointed by the district court of this district.

Second. That said Boston, Hartford and Erie Railroad Company was chartered by the States of Connecticut and Massachusetts.

Third. That the paper marked "A," annexed to the said bill and therein referred to as the subject-matter thereof, and which is in the words and figures following, to wit:

"$100,000 *temporary loan note—City of Boston.*

"This certifies that, for value received, there will be due from the City of Boston, payable at the office of the city treasurer, on demand after the first day of December next, to the general treasurer of the State of Rhode Island, or order, the sum of one hundred thousand dollars, with interest at the rate of seven per cent. per annum, in current funds. This loan being authorized by an order of the city council, passed the ninth day of June, eighteen hundred and sixty nine, to anticipate the income of the present financial year. Interest will not be allowed after the note is due.

"June 28, 1869.

"FRED. U. TRACY, *Treasurer.*

"ALFRED T. TURNER, *Auditor.*

"NATH. B. SHURTLEFF, *Mayor.*"

was by the directors and officers of the said corporation deposited with one Samuel Parker, who was then the general treasurer of said State of Rhode Island, and thereafter came into the custody of this defendant, as the successor to said Parker in said office of general treasurer of said State of Rhode Island, and that the general assembly of said State of Rhode Island, after the deposit of said paper, marked "A," with the said Parker while such general treasurer as aforesaid, passed an act approving and affirming the said deposit as security for the construction of the railroad in said bill mentioned, as authorized by said State of Rhode Island by the act in said bill mentioned, and also that the
12 complainants had made application to the State of Rhode Island and to the general assembly thereof, to deliver to them the said paper writing, marked "A," with such transfer thereof to them as would enable them to receive from the defendant Tracy, the said sum of $100,000 due thereon, but which application said general assembly had not granted, and instead thereof one house of said general assembly had passed a resolve authorizing and instructing the general treasurer of said State to collect said money. And this the defendant is ready to verify.

Wherefore, inasmuch as the judicial power of this court does not extend to suits in law or equity commenced or prosecuted against one of the United States by a citizen or citizens of another State, this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

SAMUEL CLARK,
General Treasurer of the State of Rhode Island, etc.

And I, the said Samuel Clark, on oath do say that the aforegoing demurrer by me signed is not interposed for delay.

SAMUEL CLARK,
General Treasurer.

Subscribed and sworn to this second day of September, A. D. 1872. Before me.

HENRY PITTMAN,
Clerk U. S Circuit Court, Rhode Island District.

We, the undersigned, hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

CHARLES HART,
SAMUEL CURRY,
Counsel and Solicitors for Defendant Clark, in the above-entitled cause.

SEPTEMBER 2, 1872.

13 This cause was thence continued from term to term, to the May term of this court, A. D. 1877, when the same was set down for hearing on demurrer and fully heard before the honorable George F. Shepley, circuit judge, and thereupon the following order of court was entered, namely:

Order of court.—May 25, 1877.

SHEPLEY, J.

And now, to wit, May 25, 1877, after hearing the parties upon the demurrer of Samuel Clark, one of the defendants in this cause, it is ordered, adjudged, and decreed that the said demurrer be, and the same is, overruled, and that the said defendant, Samuel Clark, have leave to answer the bill of complaint in said cause within thirty days.

By the court:

JOHN G. STETSON, *Clerk.*

MEMORANDUM.—This bill of complaint was taken pro confesso as against the defendant the City of Boston, at the June rules, 1877.

JOHN G. STETSON, *Clerk.*

On the second day of October, A. D. 1877, the following answer was filed, namely:

Answer of Samuel Clark.—Filed by consent, Oct. 2, 1877.

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereunto says it is true, as stated in said bill, that this defendant was duly elected and qualified as general treasurer of the State of Rhode Island, in place of said Samuel Parker, deceased,
14 shortly after his decease, first, by the general assembly of said State of Rhode Island, to wit, on the sixteenth day of February, 1872, and that he, this defendant, has held that office from said sixteenth day of February, 1872, to the present time, and now holds said office, by successive elections of the people of Rhode Island in each year, in their annual election of general officers of the State, pursuant to the constitution and laws of said State. That on this defendant's entering upon the duties of his said office of general treasurer on said sixteenth day of February, 1872, in the place and stead of the said Samuel Parker, deceased, as aforesaid, this defendant found among the papers and assets in, of, and belonging to said office the said paper writing, marked A, mentioned in the complainants' said bill, purporting to be, and being, as this defendant is advised and believes, the property of said State of Rhode Island, and which this defendant then took possession of as such property, and has accordingly hitherto held and now holds the same as the property of said State of Rhode Island by virtue of his said office of general treasurer of said State, and not otherwise; and that as such general treasurer of said State he has no choice but to so continue to hold the same, or to collect the moneys which may be collected thereon, and to deposit the same, when collected, on special account as he is directed by a resolve of the general assembly of said State, passed at the January session thereof, 1872, to which this defendant craves leave to refer by the annexed copy thereof, marked B.

And this defendant, further answering, says that in taking possession of his said office as such general treasurer as aforesaid, and of the assets therein, he found filed, in connection with the said paper A, the bond of said corporation, mentioned in said bill of complaint, with the indorsements thereon of the votes of the directors of said corporation, authoriz-

ing the president of said corporation to execute and deliver said bond, and to purchase or otherwise procure and deposit therewith such paper as said paper A mentioned in said bill, as collateral security to the said bond, and also the acceptance of said bond and security by the governor of Rhode Island as a satisfactory compliance with the said condition of said entitled act, to which bond and the said indorsement thereon, hereto annexed, marked C, this defendant craves leave to refer.

15 And this defendant, further answering, says that the condition of said bond has been broken by the non-completion of said connecting link of railroad therein described before the first day of January, 1872, and that the said paper A, and the said sum of money therein specified to be paid, deposited with the said bond in pledge as collateral security for the performance of the said condition, have thereby become forfeited to said State of Rhode Island.

And this defendant, further answering as to the statement of said bill, that "the directors of said Boston, Hartford and Erie Railroad Company, without authority from said corporation or by law, applied to the legislature of the said State of Rhode Island, at the January session thereof for the year 1869, and obtained from said legislature the passage of a certain act, being an act in addition to an act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company, by which said Boston, Hartford and Erie Railroad Company was authorized to locate and construct a railroad in extension of their line of railroad by them purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point on their said purchased railroad at or near their freight depot in the city of Providence, thence running westerly and northerly by a line westerly of the State prison, a little easterly of the Rhode Island Locomotive Works, and by nearly a straight line, and crossing or running near Leonard's Pond, and thence passing between the villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad, and thence continuing to the easterly line of the State in or near the village of Valley Falls, there to meet and connect with a railroad extending westerly through Attleboro', from the direction of Boston, authorized by the commonwealth of Massachusetts," says that it appears by original petition, now on file in the office of the secretary of state of the State of Rhode Island, an authentic office copy whereof is hereunto annexed, marked D, to which this defendant craves leave to refer, that said Boston, Hartford and Erie Railroad Company, by its then president, George M. Bartholomew, applied to the general assembly of the State of Rhode Island, at its January session, not for the year 1869, but for the year 1864, for

16 the passage of such act as in said bill of complaint is mentioned, and that their said petition, signed by their said president, George M. Bartholomew, was continued from session to session of said general assembly, from said January session, 1864, to the said January session, 1869, with such orders of public notice, references to committees, public hearings, and other action thereon as appears by indorsements thereof on said copy of said petition, until the said petition was granted by said general assembly, by the passage of the aforementioned entitled act, to wit, at the January session of said general assembly, 1869. And this defendant here submits the point as a question of law to this honorable court, that such

pendency of the said petition for the period of five years before such public body as the general assembly of Rhode Island, with such orders for public notice and public hearings thereof as appears indorsed on said petition, is good ground for the legal presumption, in the absence of evidence to the contrary, that the directors of said Boston, Hartford and Erie Railroad Company had authority from said corporation to apply for and to have procured the passage of the said entitled act; and as further evidence of the presumption of authority in the said directors to have applied for and procured the passage of said entitled act, this defendant craves leave to refer to the contract between the Boston, Hartford and Erie Railroad Company and the Hartford, Providence and Fishkill Railroad Company, dated August 28th, 1863, copy whereof is hereunto annexed, marked E, by the first section of which it appears, as this defendant is advised, that the construction by said Boston, Hartford and Erie Railroad Company of such connecting link of railroad in Rhode Island as is authorized by the said entitled act, between the city of Providence and the easterly line of the State, near said Valley Falls, was a material part of the contract to be performed by said Boston, Hartford and Erie Railroad Company, as a consideration for its purchase of the railroad of said Hartford, Providence and Fishkill Railroad Company.

And this defendant, further answering as to the statement in said bill "that the condition imposed upon said entitled act was not complied with, and that said act never took effect, and was and is wholly null and void," says he is advised and believes, and here submits the matter as a
17 question of law to this honorable court, that security being the object of requiring sureties in a bond, it was competent for the governor of Rhode Island—to whom, by the terms of said act, the sureties in said bond of said corporation were to be satisfactory—to accept security as collateral to said bond in place of sureties, and that the giving of such security by said corporation, together with its bond, within the time limited by said condition in said act, and their acceptance by the said governor within said time, formed a sufficient compliance with said condition, and that said act thereupon took effect as the grant of a privilege and right in said Boston, Hartford and Erie Railroad Company to construct said connecting link of railroad in Rhode Island, without limitation of time or other condition, the more evidently as the general assembly of said State, at its session of January, 1871, enacted a resolve approving of the acceptance by the governor of said security, in place of sureties in the bond of said corporation, to which said resolve this defendant craves leave to refer, by the authentic annexed copy thereof, marked F.

And this defendant, further answering as to the statement in said bill that said corporation (meaning said Boston, Hartford and Erie Railroad Company) never accepted the said act (meaning the act entitled "An act in addition to an act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company"), says he is informed and believes that said corporation did accept said entitled act by a vote of its stockholders at the annual meeting of said company, holden in Boston on the eighth day of September, 1869, upon due notice, in accordance with the by-laws, practice, and usage of said company, that the question of the acceptance of said act would be proposed to the stockholders at said annual meeting, all which appears by the

records of sai l corporation, in regard to which this defendant craves leave to unite and join with the complainants in referring thereto. And as to the statement in said bill that said corporation never authorized its directors and officers to give the bond required by said act, or to use the funds of said corporation as security for the performance of the condition of said bond, this defendant, further answering, says that the acceptance of said act by said corporation by vote of its stockholders, at their
18 said annual meeting, on the eighth day of September, 1869, was from two to three months subsequent to the giving of the said bond of the corporation and the deposit of said paper A, with the said Parker, deceased, as collateral thereto, which said subsequent acceptance of said act, with the said onerous condition thereto annexed in respect to the requiring of said bond in order to its taking effect, this defendant submits to this honorable court, ought to be taken, in the absence of evidence to the contrary, as an approval by said corporation and its stockholders of the giving of said bond, and the deposit of said paper A therewith, as collateral thereto.

And this defendant, further answering as to the statement in said bill that at some time after the deposit of said paper A, less than four months prior to the bankruptcy of the said Boston, Hartford and Erie Railroad Company, the vice-president and financial agent of said company, through his agent and counsel, sued out a writ of attachment and trustee process in the supreme court of said State of Rhode Island, and attempted and undertook to trustee, as the funds and property of said corporation, said paper A, in the hands of said Parker, the general treasurer of said State of Rhode Island, he, this defendant, is wholly ignorant of every such matter, save as informed by said statement in the complainants' said bill.

And as to the statement in said bill that the railroad authorized by said (entitled) act has never been built, or any part thereof, this defendant admits said statement to be true, though this defendant is informed and believes, and therefore avers, that preliminary steps were early taken by said corporation, after the passage of said entitled act, preparatory to the location of said railroad, and in ascertaining the names of the owners of land on which the same might be located, but whether or not said State of Rhode Island or any citizen thereof has suffered any loss or damage by reason of the passage of said entitled act, this defendant neither affirms or denies, as he has no knowledge of any such matter. And this defendant admits it to be true, as stated in said bill, that the said Boston, Hartford and Erie Railroad Company has been duly adjudged a bankrupt, and that the complainants have been duly appointed assignees of the said bankrupt, and that all the assets, estate, and property of the said bankrupt corporation
19 have vested in the complainants, as of the twenty-first day of October, 1870, by virtue of their said appointment, but this defendant denies that the said assignees now have, or ever had, any title to the said one hundred thousand dollars, deposited with the defendant, said Frederic N. Tracy, city treasurer of said City of Boston, or to the said paper writing marked A, deposited with the said Samuel Parker, deceased, as general treasurer of said State of Rhode Island, as collateral to the aforesaid bond of said bankrupt corporation, as hereinbefore stated by this defendant, and which this defendant found amongst the assets belonging to the office of the general treasurer of said State of Rhode Island on his entering upon

the duties of said office, in place of said Parker, deceased, to wit, on said sixteenth day of February, 1872.

And this defendant, further answering, says that it appearing from the statement in said bill, to wit, in the second paragraph on the first page thereof, that "the said bankrupt corporation was incorporated by the States of Connecticut and Massachusetts," and is therefore a citizen of another or other States than the State of Rhode Island, and the complainants bringing this suit in their said representative character of assignees of said bankrupt corporation, must as such complainants in said cause be in like manner deemed and taken to be citizens of another or other States than said State of Rhode Island; and it also appearing upon the face of said bill, and as this defendant here avers to be true from the whole tenor and effect thereof, that said suit of the complainants is against this defendant in his representative capacity of general treasurer of said State of Rhode Island, and is therefore in substance and effect a suit against the State of Rhode Island, and falls within the prohibition of the eleventh article of the amendments to the Constitution of the United States, and ought to be dismissed for want of jurisdiction in this court.

Without this, that there is any other matter or thing in the complainants' said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honor-
20 able court shall direct; and humbly prays to be hence dismissed with the defendants' reasonable costs and charges in this behalf, most unreasonably sustained.

SAMUEL CLARK,
General Treasurer.

CHARLES HART,
SAMUEL CURREY,
Defendants' Solicitors.

DISTRICT OF RHODE ISLAND, ETC.
Providence, Sept. 20, 1877.

Personally appeared the within-named Samuel Clark, general treasurer, and made oath that the facts and statements contained in the above answer by him subscribed are true, so far as the same are stated of his own knowledge, and those statements made upon information and belief are true according to the best of his information and belief.

Before me.

HENRY PITMAN,
Clerk U. S. Circuit Court for the District of Rhode Island.

21 On the thirteenth day of November, A. D. 1877, the following agreed statement of facts was filed, namely:

Agreed statement of facts.—Filed Nov. 13, 1877.

Bill in equity, filed March 9, 1872, by the assignees in bankruptcy of the Boston, Hartford and Erie Railroad Company against Samuel Clark, The City of Boston, and Frederick U. Tracy. The defendant Clark has

filed an answer, and the complainants have filed a general replication. The pleadings are hereto annexed, and may be referred to.

The Boston, Hartford and Erie Railroad Company was chartered by the States of Connecticut and Massachusetts, for the purpose of building, acquiring, and operating a railroad from Boston to Willimantic, in Connecticut, and from Providence to Willimantic, and from Willimantic to Fishkill. A copy of the first section of a contract between the Boston, Hartford and Erie Railroad Company and the Hartford, Providence and Fishkill Railroad Company is hereto annexed and marked Exhibit K. The statutes of any of the States affecting the Boston, Hartford and Erie Railroad, or any of the railroads of which it was formed, or any railroad connected therewith, may be referred to.

At the January session of the general assembly of the State of Rhode Island, 1864, petitions were presented to said assembly, signed by George M. Bartholomew, then president of said company, copies of which,
22 with the indorsements thereon, are hereto annexed, marked Exhibit A. The corporation never authorized or ratified the presenting of said petitions, except so far as appears by the facts hereinafter stated, or as may be legally inferred therefrom.

At the January session of said assembly, 1869, an act was passed, a copy of which is hereto annexed, marked Exhibit B. The general assembly rose on March 26, 1869.

The directors of said company caused to be filed on June 24, 1869, with one Samuel Parker, who was at that time the general treasurer of the State of Rhode Island, a paper, a copy of which is hereto annexed, marked Exhibit C. They also took the sum of $100,000 of the funds of the said company, deposited the said sum with the defendant Frederic U. Tracy, who was the treasurer of the city of Boston, and said Tracy thereupon delivered to them a paper, a copy of which is hereto annexed, marked Exhibit D, and they delivered the same to said Parker. No suit has ever been brought upon said paper marked Exhibit D against said city.

The said company never authorized or ratified these doings of said directors, except as herein stated, nor did they accept said act of said assembly except as herein stated.

The governor of the State of Rhode Island made upon the bond aforesaid an indorsement, a copy of which, marked Exhibit E, is hereto annexed.

On Sept. 8, 1869, at a meeting of said company duly called, a vote was passed, a copy of which, marked Exhibit G, is hereto annexed. The notice for said meeting is hereto annexed, and marked Exhibit F.

A petition in bankruptcy was filed against the Boston, Hartford and Erie Railroad Company in the district court of the United States for the district of Massachusetts Oct. 21, 1870, and the company was adjudged a bankrupt, and afterwards the plaintiffs were appointed assignees, and all the assets and rights of the bankrupt were assigned to and vested in them.

On March 23, 1871, said general assembly passed a resolution, a copy whereof is hereto annexed, marked Exhibit H; and on March 19, 1872, another resolution, a copy whereof is hereto annexed, marked Exhibit I.

No railroad or any part of a railroad was ever built under said act
23 of said assembly, nor was any work done thereunder, except a pre-

liminary survey of the route as described in the act, and the obtaining of the names of the land-owners on said route; nor is there any evidence of any damage accruing to the State of Rhode Island or any citizen thereof under said act, or anything done or omitted to be done thereunder.

In December, 1873, the Boston, Hartford and Erie Railroad Company was dissolved by a decree of the superior court of Connecticut.

Samuel Parker deceased in 1872, and the defendant Clark was chosen his successor as general treasurer of the State of Rhode Island, and has held the office ever since.

He found the paper, a copy of which is marked D, among the official papers of said Parker, took possession of the same, and claims to hold it as said general treasurer.

The case is submitted to the court on the above agreed facts, the court to make such decree as law and equity may require.

ROBERT R. BISHOP,
JOHN C. GRAY, JR.,
For Complainants.
CHARLES HART,
SAMUEL CURREY,
For Defendants.

EXHIBIT A.

To the honorable general assembly of the State of Rhode Island and Providence Plantations, at their January session, A. D. 1864, at Providence:

Respectfully represents the Boston, Hartford and Erie Railroad Company, a corporation created by the general assembly of State of Connecticut, that having in view the completion of a continuous line of railroad, extending to and connecting with the Erie Railroad at Fishkill, on the Hudson River on the west, and the harbor of Boston and the city of Providence on the east, and having for said purpose purchased the Hartford, Providence and Fishkill Railroad, its property and franchises, being a principal part of said line and being now actually engaged in constructing other parts of said line under authority granted by the States of Massachusetts, Connecticut, and New York, and being under the necessity of extending the line of said Hartford, Providence and Fishkill Railroad from a point in the city of Providence to the easterly line of the State, in order to form said continuous line of railroad east and west, present this their petition to your honorable body, praying that they may be authorized and empowered to extend said railroad by them purchased of said Hartford, Providence and Fishkill Railroad Company from its present easterly terminus in the city of Providence, being a point about twenty-four rods westerly of the westerly end of the passenger depot in said city; thence easterly along the northerly and westerly side of the present rails laid along the southerly and easterly side of the park, and as far within and upon the outer margin of said park as may be necessary to avoid interfering with the rails of other railroad companies there located; thence northerly along the westerly side of the rails of the Providence and Worcester and Boston and Providence Railroad companies about four

24

miles, to a point where said railways turn eastwardly towards the village of Pawtucket; thence diverging a little to the north and continuing in that direction for about a half a mile; thence turning in a straight line for about one other half mile; thence turning more easterly and crossing the Providence and Worcester Railroad and continuing easterly to the easterly line of the State, in or near the village of Valley Falls; there to meet and connect with a railroad extending westerly through North Attleborough from Boston.

And they will ever pray.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY,
By GEO. M. BARTHOLOMEW, *President.*

The foregoing petition is indorsed as follows:

Petition of the Boston, Hartford and Erie Railroad Company for leave and authority to extend their railroad from a point in the city of Providence to the State line at or near Valley Falls.

C. HART & S. CURREY,
Counsel for Petitioners.

H. OF R., *Feb.* 8, '64.

Rec'd, ref. to com. on corporations.

I. T., *Clerk.*

25 Com. recom. to continue to next May session of the general assembly, with an order of notice, as provided by accompanying act.

B. N. LAPHAM,
For the Com.

H. R., *March* 2, '64.

Continued with order of notice.

I. T., *Clerk.*

H. R., *June* 1, '64.

Ref. to com. on corporations.

I. T., *Clerk.*

Recommended that the petitioners have leave to withdraw.

J. E. WEEDEN,
For the Committee.

H. R., *Feb.* 14, '65.

Made the special order of the day for Tuesday next.

I. T., *Clerk.*

H. R., *Feb.* 21, '65.

Made the special order for Tuesday next.

I. T., *Clerk.*

H. R., *Feb.* 28, '65.

Made special order immediately after disposition of the colored school question.

I. T., *Clerk.*

H. R., *M'ch* 7, '65.

Postponed to May session.

I. T., *Clerk.*

H. R., *May* 30, '65.

Ref. to com. on corporations.

J. W. C., *Clerk.*

Continued to the next May session of the general assembly, with an order of notice.

THOS. DAVIS, *For Com.*

H. R., *May* 9, 1866.

Continued to next May session.

J. W. C., *Clerk.*

H. R., *May* 29, 1866.

Ref. to com. on the corporations.

J. W. C., *Clerk pro tem.*

26 (Copy of printed notice pasted on back of foregoing petition.)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
Secretary's Office, Providence, March 7th, 1864.

Upon the petition of the Boston, Hartford and Erie Railroad Company for leave to build a railroad from the city of Providence to the Massachusetts line:

It is ordered that said petition be continued to the next May session of the general assembly, and that the petitioners give notice of the pendency of said petition, of the purpose thereof, and of the proposed route of said railroad, in some newspaper printed in the city of Providence, for three weeks successively preceding the first of April next.

In conformity with the foregoing order, notice is hereby given that the Boston, Hartford and Erie Railroad Company, having purchased the Hartford, Providence and Fishkill Railroad, its property and franchises, is desirous to construct a continuous line of railroad extending to and connecting with the Erie Railroad at Fishkill, on the Hudson River on the west, and the harbor of Boston on the east; and in order to form said continuous line said railroad company has petitioned the general assembly that they may be authorized and empowered to extend the railroad by them purchased of the Hartford, Providence and Fishkill Railroad from its present easterly terminus in the city of Providence, being a point about twenty-four rods westerly of the westerly end of the passenger depot in

said city; thence easterly along the northerly and westerly side of the present rails laid along the southerly and easterly side of the park, and as far within and upon the outer margin of said park as may be necessary to avoid interfering with the rails of other railroad companies there located; thence northerly along the westerly side of the rails of the Providence and Worcester and Boston and Providence Railroad companies about four miles to a point where said railways turn eastwardly towards the village of Pawtucket; thence diverging a little to the
27 north and continuing in that direction for about half a mile; thence turning easterly in a straight line for about one other half mile; thence turning more easterly and crossing the Providence and Worcester Railroad, and continuing easterly to the easterly line of the State, in or near the village of Valley Falls, there to meet and connect with a railroad extending westerly through North Attleboro' from Boston.

It is further ordered that the above petition, and the act accompanying the same, be continued to the next May session of the general assembly.

JOHN R. BARTLETT,
Secretary of State.

m8 3w

STATE OF RHODE ISLAND, &C.,
OFFICE OF THE SECRETARY OF STATE,
Providence, Sept. 21, 1877.

I certify the foregoing to be true copies of the original petition on file in this office, and of the endorsements thereon, and of the published notice ordered by the general assembly.

In testimony whereof I have hereunto set my hand and affixed the seal of the State aforesaid, this twenty-first day of September, A. D. 1877.

[L. S.] JOSHUA M. ADDEMAN,
Secretary of State.

To the honorable general assembly of the State of Rhode Island and Providence Plantations, January session, A. D. one thousand eight hundred and sixty-four:

Respectfully prays the Boston, Hartford and Erie Railroad Company, successors to the Providence, Hartford and Fishkill Railroad Company, for leave to extend their railway from a point in their present location, commencing at or near their freight station in the city of Providence, thence running northerly by a line westerly of and in the near vicinity of the State's prison, and thence in nearly a straight line and crossing or running near to the Leonard Pond (so called), and passing between the villages of Pawtucket and Lonsdale, and over the railway of the
28 Providence and Worcester Railroad Company, in or near the village of Valley Falls, and thence easterly to the easterly line of the State of Rhode Island, in the town of Cumberland; there to meet and connect with the railway of a railway corporation established by the State of Massachusetts.

Dated at Providence, January 1, 1864.

BOSTON, HARTFORD AND ERIE RAILROAD CO.,
By GEO. M. BARTHOLOMEW, *President.*

Petition.

Boston, Hartford and Erie Railroad Co., for leave to extend their railway from Providence to the Massachusetts line.

H. OF R., *Jan'y 14th*, 1864.

Referred to com. on corporations.

I. T., *Clerk.*

H. OF R., *Jan'y* 22, 1864.

Enclosed order of notice ordered to be printed, and resolution for the same passed.

I. T., *Clerk.*

Com. recom. to continue with order of notice and the passage of accompanying act.

B. N. LAPHAM, *for Com.*

H. OF R., *Feb.* 15, '64.

Con. to May session, with order of notice, and accompanying resolution for order of notice read and passed.

I. T., *Clerk.*

H. R., *June* 1, '64.

Ref. to com. on corporations.

I. T., *Clerk.*

Recommended to be continued to next May session of general assembly.

J. E. WEEDEN, *Ch.*

29 H. R., *March* 8, '65.

Postponed to May session.

I. T., *Clerk.*

H. R., *May* 30, '65.

Ref. to com. on corporations.

J. W. C., *Clerk.*

Continued to the next May session of the general assembly, with an order of notice.

THOS. DAVIS, *for Com.*

H. R., *March* 9, '66.

Continued to next May session.

J. W. C., *Clerk.*

H. R., *May* 29, 1866.

Ref. to com. on corporations.

J. W. C., *Clerk pro tem.*

Recommended to continue to the next May session, with order of notice.

J. A. GARDNER, *Chairman.*

H. R., *Feb.* 26, '68.

Con. to May session, with order of notice.

I. T., *Clerk.*

H. R., *March* 23, '69.

Read and passed.

I. T., *Clerk.*

(Copy of printed notice.)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
Secretary's Office, Providence, March 7, 1864.

In conformity with chapter 2, section 3, of the Revised Statutes, notice is hereby given that a petition was presented to the general assembly of the State of Rhode Island, at its January session, A. D. 1864, from the Boston, Hartford and Erie Railroad Company, for the passage of an act authorizing them to extend their railway from a point in their present location, commencing at or near their freight station in the city of Providence; thence running northerly by a line westerly of and in the near vicinity of the State prison; and thence in nearly a straight line and crossing or running near to the Leonard Pond (so called), and passing between the villages of Pawtucket and Lonsdale, and over the railway of the Providence and Worcester Railroad Company, in or near the village of Valley Falls; and thence easterly to the eastern line of the State of Rhode Island, in the town of Cumberland, there to meet and connect with a railway corporation established by the State of Massachusetts.

This petition and the bill accompanying the same, was by the general assembly continued to its May session.

JOHN R. BARTLETT,
Secretary of State.

m8 3w.

(Copy of printed notice accompanying foregoing petition.)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.
Secretary's Office, Providence, March 24, 1868.

Upon the petition of the Boston, Hartford and Erie Railroad Company, representing themselves as the successors of the Hartford, Providence and Fishkill Railroad Company, that they may be authorized to extend their railroad from a point in their present location, commencing at or near their freight depot in the city of Providence, thence northerly by nearly a straight line running westerly to the State's prison and near to or crossing Leonard's Pond, and between the villages of Lonsdale and Pawtucket, crossing the Providence and Worcester Railroad in or near the village of Valley Falls to the easterly line of the State, there to connect with a railroad established by the legislature of Massachusetts:

It is ordered that said petition, together with the bill accompanying the

same, to be continued to its next May session of the general assembly; that the order of notice thereon passed this general assembly, Feb. 26, 1868, be rescinded, and that the petitioners give notice of the pend-
31 ency thereof, by publishing this vote in some newspaper published in the city of Providence, for three weeks successively, from and after the passage of this order, with the same effect as though notice had been given according to law, three weeks before the first Wednesday in April, 1868.

JOHN R. BARTLETT,
Secretary of State.

m25 3w.

STATE OF RHODE ISLAND,
OFFICE OF THE SECRETARY OF STATE,
Providence, Sept. 21, 1877.

I certify the foregoing to be true copies of the original petition on file in this office, and of the endorsements thereon, and of the published notices ordered by the general assembly.

In testimony whereof I have hereunto set my hand and affixed the seal of the State aforesaid this twenty-first day of September, A. D. 1877.

[L. S.] JOSHUA M. ADDEMAN,
Secretary of State.

EXHIBIT B.

An act in addition to an act entitled "An act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company."

It is enacted by the general assembly as follows:

SECTION 1. The Boston, Hartford and Erie Railroad Company, a corporation created by the general assembly of the State of Connecticut, are hereby authorized and empowered to locate, lay out, and construct a railroad in extension of their line of railroad by them purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point in their said purchased railroad at or near their freight depot in the city of Providence, thence running westerly and northerly by a line westerly of the State prison, a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line, and crossing or run-
32 ning near to Leonard's Pond (so called), and thence passing between the villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad; thence continuing to the easterly line of the State in or near the village of Valley Falls, there to meet and connect with a railroad extending westerly through North Attleborough, from the direction of Boston, authorized by the Commonwealth of Massachusetts. And for this purpose said corporation are hereby authorized to lay out their road not exceeding six rods wide the whole length; and for the purpose of cutting embankments, and obtaining stone and gravel, and of making tracks to and from their depots and car-houses, may take as much more land as may be necessary for the proper security and construction and use of said road: Provided, That all damages which may be occasioned to any person, company, or corporation, or the State, by taking

such land or materials for the purposes aforesaid, shall be paid for by that corporation in the manner hereinafter provided; and said corporation may purchase and hold such real estate upon the line of said road, and such materials, cars, engines, and other things, as may be necessary for depots for the use of said road, and for the transportation of persons, goods, and merchandise.

SECT. 2. Whenever said corporation shall have located said road, or any part thereof, they may make report thereof to the court of common pleas then next to be holden within and for the county of Providence, or may file the report of such location with the clerk of said court, as is by general law provided; wherein they shall particularly describe the bearings of the intended route, or any section thereof so located, and the names of the owners of the land through which the same may pass, so far as they can be ascertained; which report so made shall be placed on the files of said court, and notice given thereof to the owner or owners of the land therein embraced, if known, in such manner as the court shall direct, at the expense of said corporation; and the court shall thereupon appoint three discreet and disinterested persons of said county (vacancies, if any happen, to be filled by said court) to estimate all damages which any person or persons whose lands are described or mentioned in said report shall sustain in case such railroad, or any appurtenance thereof, be constructed thereon.

33 And the said commissioners, before they proceed to execute their duties, shall be sworn to a faithful and impartial discharge thereof; and they shall give reasonable notice, in such manner as said court shall direct, to all persons interested to file their claims, if any they have which have not been released to said corporation, with some one of said commissioners, or with the clerk of said court, within thirty days of the day of said notice. At the end of the term allowed for filing such claims, for damages, the commissioners, or a majority of them, having previously given notice to all parties interested of the time and extent of the route to be examined, by publishing in one or more of the newspapers printed in Providence an advertisement thereof in three successive papers at least, shall meet on the premises so intended to be used by said corporation for the purpose aforesaid, and after hearing the parties interested shall estimate all such damages as they shall think any person shall sustain by the construction of said railroad through his land. And the commissioners, or a majority of them, shall make return of their doings, as soon as may be, to said court of common pleas; and the said court shall thereupon order said report, or the substance thereof, to be forthwith published in one of the newspapers printed in said Providence, three weeks successively, at the expense of said corporation. And if said corporation, or any person interested shall be dissatisfied with the estimate of said commissioners, application may be made by such dissatisfied party at the next term of said court of common pleas, after the return of such report, and after its publication as aforesaid, for a jury to hear and finally determine upon the amount of damages to be assessed in the case complained of; which said application shall be heard and tried under the direction of the court by a jury, in the same manner that appeals are heard in said court. And if the party injured in his or her estate apply for such jury, and fail to obtain such increase of damages, such party shall be liable for all legal costs arising after the entry of such application for a jury; and such court shall enter judgment and issue exe-

cution accordingly. And if such corporation apply for a jury, and fail to obtain a diminution of damages, it shall, in like manner, be liable for costs; and said court may enter judgment and issue execution for the
34 same. And if, within ten days after, any damages shall have been finally assessed in manner aforesaid, said corporation shall not pay, or cause to be paid, such damages, if any, so assessed in manner aforesaid by said commissioners or such jury, such person in whose favor any such damages shall have been assessed may have an action of debt against said corporation in any court proper to try the same to recover such damages; and execution, from whatever court the same may issue, for damages assessed as aforesaid, and costs shall be in common form, and may be levied on the goods, estate, and land of said corporation. And the report of said commissioners, when accepted and recorded, and not appealed from in manner aforesaid, or the verdict of a jury returned and recorded, shall forever be a bar to any other action commenced for damages against said corporation on account of the injury for which such damages were awarded, other than is herein provided. And said commissioners shall in all cases be allowed three dollars per day for their services; provided that nothing herein contained shall be construed to prevent said corporation from commencing the construction of their said railroad, or constructing the same on the land of any person, or from taking or using the land or materials of any person for the construction or security of their said railroad under this act, before the damages for taking and using said land and materials shall have been estimated or assessed by the commissioners or a jury; and in case of such taking before the estimate and assessment of damages therefor, the damages shall be assessed by the commissioners or a jury, and like proceedings had with the same effect as if said estimate and assessment had been made before the taking and using of said land and materials.

SECT. 3. The commissioners appointed to estimate or assess damages shall, upon request in writing of any person whose land or materials may be reported as located for the uses of said railroad, require said corporation to give security to the satisfaction of said commissioners for the payment of all such damages as shall be finally awarded by said commissioners or a jury for the land or materials of the person so requesting, reported as located as aforesaid, and for all cost which may be by him recovered
35 against said corporation; and all right and authority of said corporation to enter upon and use such land or materials, except for making surveys, shall thereupon be suspended until said corporation shall give such security.

SECT. 4. When the lands or other property or estate of any married woman, infant, or person non compos mentis shall be necessary for the construction of said railroad, such married woman, and the guardians of such infant or person non compos mentis, may release all damages in relation to the land or estate to be taken and appropriated as aforesaid, as they might do if the same were holden by them in their own rights respectively.

SECT. 5. If the said railroad, in the course thereof, shall cross any private way, said corporation shall so construct said railroad as not to obstruct the safe and convenient use of said private way; and, if said railroad shall not be so constructed, the party aggrieved shall be entitled to his action on the case in any court proper to try the same, and shall recover his reasonable damages for said injury. And if said railroad shall, in the course thereof,

cross any other railroad, canal, turnpike, highway, or bridge, the said railroad hereby authorized to be built shall be so constructed as not to impede or obstruct the safe and convenient use of such other railroad, canal, turnpike, bridge, or other highway. And the said corporation shall have power to raise or lower such bridge, turnpike, or highway, or change the location of the same, or widen such bridge, so that the said railroad, if necessary, may conveniently pass under or over or across or at the side of the same. But no such railroad shall be permitted to cross any such highway at grade without the assent of the town council of the town where such crossing is located. And if said corporation shall raise or lower any such bridge, turnpike, or highway, or change the location of the same, or widen such bridge pursuant hereto, and shall not so raise or lower or widen, or change the location of the same as to be satisfactory to the proprietors of such bridge or turnpike, or to the town council of the town in which such highway may be situated, as the case may be, said proprietors or town council may require, in writing, such alteration or amendment as they may deem necessary; and if said corporation shall refuse or unreasonably neglect to make the same, such proprietors or the town council, as the case may be, may file
36 their complaint with the court of common pleas for said county; and, if said court shall adjudge that such alteration or amendment is reasonable and proper, they shall decree that the same be made by said corporation, and render judgment accordingly; and, in case said corporation shall neglect to comply with said judgment within the time prescribed by the said court, the said proprietor or town council, as the case may be, may proceed to make such alteration or amendment, and may institute and prosecute to final judgment and execution, in any court proper to try the same, an action of the case against said corporation, and shall therein recover a reasonable indemnity in damages for all charges, disbursements, labor, and services occasioned by making such alterations and amendments, with costs of suit. And if said corporation shall find it necessary to change the location of any bridge, turnpike, or highway, as herein provided, so that said railroad may be made on the best site of ground for that purpose, said corporation may take as much more land on or near the line of their said railroad as may be necessary for such change; and, if any damages shall be occasioned by the taking of such lands therefor, such damage shall be estimated and assessed and finally determined, or may be released, or said lands may be purchased, according to the provisions of this act, for the estimate and assessment, or release of damages to, or the purchase of other lands taken for said railroad.

SECT. 6. Said corporation, after having located, reported as located, or taken and used, lands or materials for the uses of their said railroad, shall have power, if they shall find it expedient, to alter the location and vary the direction of their said railroad, and make a new location of the same in whole or in any part thereof; in which case report shall be made, and damages for land or materials taken, or located and purposed to be taken, for the uses of said railroad, shall be estimated and assessed, or may be released, or said lands or materials may be purchased, and like proceedings in all respects had with like effect as if said railroad, or the portion thereof located anew, had not before been located; provided, however, that the time allowed by this act for completing their said railroad shall not be extended in consequence of such alteration.

SECT. 7. In case of any new location, said corporation may, in their report thereof, state what portion of their former location has
37 been abandoned, specifying the person or persons whose lands or materials, in whole or in part, have been abandoned in consequence of such new location; and if the lands or materials of any person before reported as located shall not have been taken and used, all proceedings for the estimate and assessment of damages in favor of such person shall stop; said corporation first paying to every such person whose lands or materials located shall have been abandoned his costs and reasonable expenses, if any, incurred in prosecuting for damages up to the time of such abandonment, said costs and expenses to be taxed by the court to whom the new location is reported. If the land or materials before reported as located have been taken or used by said corporation as the site of, or in constructing and securing, their said railroad, and the assessment of damages for the same is then pending before the commissioners or a jury, then upon such new location and abandonment as aforesaid said corporation shall have the right to give said abandonment in evidence in diminution of damages, paying costs, if the question of damages is pending before a jury on appeal, notwithstanding a diminution of damages in consequence of such abandonment then first given in evidence; or, if the commissioners or a jury have finally assessed the damages, said corporation in case of a new location and abandonment as aforesaid shall have a right to a revision of the assessment of damages, and to a reassessment of the same by petition to the commissioners, in order that the diminution of damages in consequence of such abandonment may be considered, with right of appeal, upon like terms to either party as in other cases. The filing of such petition for revision of damages, and notice to the person or persons affected thereby shall perpetually stay all actions or rights of action for the recovery of the damages first assessed; said corporation first making tender of the taxed costs in such action, if any be pending, in the clerk's office of the court where the same may be pending up to the time of such tender.

SECT. 8. Said railroad, when the same shall have been constructed, shall be managed and protected in all respects according to the provisions of, and be subject to, an act entitled "An act to incorporate the Providence and Plainfield Railroad Company," and the several acts in addition to and amendment thereof, and the general laws of the State.

38 SECT. 9. If the location of said railroad shall not have been filed in the clerk's office of the court of common pleas for said county of Providence previous to the first day of February, A. D. 1870, or if said corporation shall fail to complete their said road before the first day of January, A. D. 1872, this act shall be void and of no effect.

SECT. 10. Nothing in this act contained shall be construed to authorize said corporation to construct any part of said railroad in the city of Providence without having first obtained the consent of the city council of said city, and upon such conditions as said city council shall prescribe.

SECT. 11. The said Boston, Hartford and Erie Railroad Company shall have an office in the city of Providence, and shall appoint an agent or attorney resident in said city of Providence; and in all proceedings, whether in law or equity, in which the said corporation shall be a party, the leaving an attested copy of the writ, summons, or other process at said office,

or with the said agent or attorney, or any director of said corporation residing in this State, shall be deemed a sufficient service thereof; and all executions that shall issue against said corporation may be levied on the property of said corporation of every description, or in such manner as the general assembly may hereafter prescribe for the service of process or levying of execution against said corporation.

SECT. 12. This act shall not go into effect unless the said Boston, Hartford and Erie Railroad Company shall, within ninety days from the rising of this general assembly, deposit in the office of the general treasurer their bond, with sureties satisfactory to the governor of this State in the sum of one hundred thousand dollars, that they will complete their said road before the first day of January, A. D. 1872.

(January, 1869, p. 186.)

EXHIBIT C.

Know all men by these presents that the Boston, Hartford and Erie Railroad Company, a corporation created by the general assembly
39 of the State of Connecticut, is held and firmly bound to the State of Rhode Island and Providence Plantations in the sum of one hundred thousand dollars, to be paid to said State of Rhode Island and Providence Plantations; to which payment, well and truly to be made, the said corporation doth bind itself and its successors firmly by these presents.

The condition of the aforewritten obligation is such that whereas by an act of the general assembly of said State of Rhode Island, entitled "An act in addition to an act entitled an act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company," passed at the January session, 1869, said Boston, Hartford and Erie Railroad Company are authorized and empowered to locate, lay out, and construct a railroad, in extension of their line of railroad purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point in their said purchased railroad at or near their freight depot in the city of Providence, thence running westerly and northerly by a line westerly of the State's prison, a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line and crossing or running near to Leonard's Pond, and thence passing between the villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad, thence continuing to the easterly line of the State, in or near the village of Valley Falls:

Now, therefore, if said Boston, Hartford and Erie Railroad Company shall complete their said railroad before the first day of January, A. D. 1872, then the aforewritten obligation shall be void; otherwise be and remain in full force and effect.

In testimony whereof said Boston, Hartford and Erie Railroad Company have caused this instrument to be signed by John S. Eldridge, its president, and its corporate seal to be thereto affixed this twenty-third day of June, 1869.

[L. S.] BOSTON, HARTFORD AND ERIE R. R. Co.,
By JOHN S. ELDRIDGE, *President.*

Executed in presence of—
SAMUEL CURREY.
H. S. BARRY.

40 At a meeting of directors of the Boston, Hartford and Erie Railroad Company, lawfully called and held June 12th, 1869, it was voted that our president be and he is authorized and empowered to make, execute, and deliver any bond he may judge proper, required by the legislature of the State of Rhode Island, under an act passed at its January session, 1869, authorizing this company to construct a line of railroad from a point in the city of Providence to the line of the State of Massachusetts, and to purchase or otherwise procure and deposit as security or surety upon said bond any bonds of the United States or of any State or municipality, and to such an amount as our president may find necessary and proper.

A true exemplication from the original record.

Attest:

THOMAS E. GRAVES,
Clerk pro tem. of the Meeting.

Voted, that our president be, and he is, authorized and empowered to make and execute and deliver any bond he may judge proper, required by the legislature of the State of Rhode Island, under an act passed at its January session, A. D. 1869, authorizing the company to construct a line of railroad from a point in the city of Providence to the line of the State of Massachusetts, and to purchase or otherwise procure and to deposit as security or surety upon said bond any bonds of the United States or of any State or municipality, and to such an amount as our president may find necessary and proper.

I certify that the foregoing is a true copy from the record book of the board of directors of the B., H. & E. R. R. Co., of date of June 12th, 1869.

H. S. BARRY,
Ass't Treas. B., H. & E. R. R. Co.
and Clerk of Board pro tem.

TREASURER'S OFFICE OF BOSTON,
HARTFORD & ERIE R. R. Co.,
Boston, June 23d, 1869.

41 EXHIBIT D.

$100,000.] TEMPORARY LOANS. CITY OF BOSTON. [No. 6.

This certifies that, for value received, there will be due from the City of Boston, payable at the office of the city treasurer, on demand, after the first day of December next, to the general treasurer of the State of Rhode Island, or order, the sum of one hundred thousand dollars, with interest at the rate of seven per cent. per annum in current funds.

This loan being authorized by an order of the city council, passed the ninth day of June, eighteen hundred and sixty-nine, to anticipate the income of the present financial year.

Interest will not be allowed after this note is due.

June 28, 1869.

NATH. B. SHURTLEFF, *Mayor.*

FRED. U. TRACY, *Treasurer.*
ALFRED T. TURNER, *Auditor.*

EXHIBIT E.

The deposit of this bond by the Boston, Hartford and Erie Railroad Company on this twenty-fourth day of June, 1869, together with the sum of one hundred thousand dollars ($100,000), in the office of the general treasurer of this State in pledge and collateral security for the performance of the obligation of said bond, according to the tenor and effect thereof and the condition therein written, as accepted by me as satisfactory security of said bond and condition, according to the intent and meaning of the 12th section of the said act whose title is recited in said condition.

Providence, State of Rhode Island, June 24th, 1869.

SETH PADELFORD, *Governor.*

42 ATTORNEY-GENERAL'S OFFICE,
Providence, June 24th, 1869.

I hereby certify that the within bond is sufficient in form, and the offer of the security therein described is within the scope of the authority of the board of directors of said road.

WILLARD SAYLES,
Attorney-General.

STATE OF RHODE ISLAND,
GENERAL TREASURER'S OFFICE,
Providence, July 22, 1872.

I certify the aforegoing to be a true copy of a bond deposited in this office, with the endorsements thereon.

[L. S.] SAMUEL CLARK,
General Treasurer.

C. Copy. C. Bond of the Boston, Hartford & Erie Railroad Compay, to State of Rhode Island.

EXHIBIT F.

"NOTICE.—The annual meeting of the stockholders in the Boston Hartford and Erie Railroad Company will be held at the office of the company, No. 12 Pemberton Square, Boston, in Massachusetts, on Wednesday, the 8th day of Sept., 1869, at 12 o'clock noon, for the following purposes, to wit: 1st, the choice of directors and other lawful officers for the year ensuing; 2d, to see if the company will accept the acts and grants of the legislature of Connecticut, Rhode Island, and Massachusetts; 3d, to do any other lawful business."

Boston, August 16, 1869.

(Signed) H. A. OTIS, *Secretary.*

EXHIBIT G.

ANNUAL MEETING, *Sept.* 8, 1869.

That this company does accept of the acts and grants of the legislatures of Connecticut, Rhode Island, and Massachusetts, granting any further and additional rights or powers in favor of this corporation, and the clerk shall make proper certificate, and lodge with the proper officers.

43 EXHIBIT H.

STATE OF RHODE ISLAND,
In General Assembly, January session, A. D. 1871.

Resolution approving the action of the governor in accepting security from the Boston, Hartford and Erie Railroad Company for the construction of a certain railroad.

Resolved, That the action of the governor in accepting security for the construction of the railroad by the Boston, Hartford and Erie Railroad, authorized by the general assembly to be constructed by this corporation under the provisions of an act entitled "An act in addition to an act entitled an act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad," passed at the January session of this general assembly, A. D. 1869, be, and the same is hereby, approved and affirmed.

STATE OF RHODE ISLAND, &C.,
OFFICE OF THE SECRETARY OF STATE,
Providence, September 21, 1871.

I certify the foregoing to be a true copy of a resolution passed by the general assembly of said State March 23, 1871.

In testimony whereof I have hereunto set my hand and affixed the seal of the State aforesaid, this twenty-first day of September, A. D. 1877.

[L. S.] JOSHUA M. ADDEMAN,
Secretary of State.

44 EXHIBIT I.

STATE OF RHODE ISLAND, &C.,
In General Assembly, January session, A. D. 1872.

Resolution relative to the bond of the Boston, Hartford and Erie Railroad Company.

Resolved, That the general treasurer be, and he is hereby, directed to collect of the City of Boston the note for ($100,000) one hundred thousand dollars, made by said city, and now held by the State as an irredeemable pledge of the Boston, Hartford and Erie Railroad Company, and when collected to deposit the money received thereon to the credit of the State, in the Rhode Island Hospital Trust Company, on special account, for accumulation, until otherwise ordered by the general assembly; and that in order to secure the collection of said note, as aforesaid, the governor shall be authorized to employ and furnish to the general treasurer the advice and service of such counsel as he deem necessary or expedient.

STATE OF RHODE ISLAND, &C.,
OFFICE OF THE SECRETARY OF STATE,
Providence, September 21, 1877.

I certify the foregoing to be a true copy of a resolution passed by the general assembly of said State March 19th, 1872.

In testimony whereof I have hereunto set my hand and affixed the seal of the State aforesaid, this twenty-first day of September, A. D. 1877.

[L. S.] JOSHUA M. ADDEMAN,
Secretary of State.

45, 46 EXHIBIT K.

Contract between the Boston, Hartford and Erie Railroad Company and the Hartford, Providence and Fishkill Railroad Company, August 28, 1863.

SEC. 1. Whereas it is intended by the party of the second part to extend the railroad of the party of the first part so as to connect it with the Erie Railroad at Fishkill on the west, and with the harbor of Boston and the city of Providence on the east, said party of the first part, with a view of promoting said object and in consideration of the matters herein contained, does hereby agree to lease to said party of the second part, for the term of nine hundred and ninety-nine (999) years, the railroad, the whole of the estate and property of said party of the first part, real, personal, and mixed, of any name and nature, however described and wherever situated and being; and also to sell and convey by deed in fee-simple, subject to said lease, their railroad franchises, the above-described estate and property, to said party of the second part, and both said lease and deed in fee-simple to be made subject to certain mortgages and the rights of trustees and mortgages under the same, which mortgages are recorded in the office of the secretary of the State of Connecticut and in the office of the secretary of the State of Rhode Island, to which records reference is had for a description of the property mortgaged and the terms of the same, and also subject to land claims, if any such exist.

47 This cause was thence continued to the October term of this court, A. D. 1877, when the same was set down for hearing on the bill, answer, and agreed statement of facts, and fully heard on the fifth day of February, A. D. 1878, before the honorable George F. Shepley, circuit judge, and after due deliberation thereon had the following interlocutory decree was entered, namely:

Interlocutory decree.—April 15, 1878.

SHEPLEY, J.:

This cause came on to be heard and was heard at the October term, A. D. 1877, upon bill, answers, and proofs. And now, after hearing the same and the arguments of the counsel for the respective parties, and duly considering the same, it is, on this fifteenth day of April, 1878, ordered, adjudged, and decreed as follows, viz: That the treasurer of the city of Boston, within fifteen days from this date, pay into the registry of this court the amount due upon the certificate of indebtedness of the city of Boston, dated June 28, 1869, and signed by the treasurer, auditor, and mayor of said city of Boston, the amount so due being the sum of $100,000, with interest, at the rate of seven per cent. per annum, from the twenty-eighth day of June to the first day of December, A. D. 1869, and that the receipt of the register of this court shall be a full and perfect discharge to the said City of Boston and the treasurer of the said city against

the claims of the general treasurer of Rhode Island, and against any and all claims of any and all persons or bodies corporate whatever, for or on account of said sum of money, or any liability arising or growing out of said paper writing or certificate of indebtedness, except for interest after said date, if any be due. This decree not to prejudice or settle the claim for further interest until the City of Boston appears and be heard on that question.

48 And it is further ordered, adjudged, and decreed that the general treasurer of the State of Rhode Island have sixty days from the date of this decree to take and file in this court any evidence in relation to any claims for damages by reason of any breach of the bond of the Boston, Hartford and Erie R. R. Co. to the State of Rhode Island and Providence Plantations, dated the twenty-third day of June, A. D. 1869, or any other claim upon said certificate of indebtedness, and the complainants in this cause be allowed thirty days thereafter to take and file any testimony in relation to said claims and damages, and the said general treasurer be allowed ten days thereafter in which to take and file evidence in rebuttal only.

And inasmuch as the said certificate of indebtedness was given by the treasurer of the said City of Boston in consideration of the sum of one hundred thousand dollars, loaned to the said City of Boston by the Boston, Hartford and Erie Railroad Company and the said Boston, Hartford and Erie Railroad Company, delivered the said certificate of indebtedness to the general treasurer aforesaid, as security for the faithful performance of the bond aforesaid of said railroad company to the State of Rhode Island and Providence Plantations, and in lieu and place of other or any surety or sureties on said bond, and inasmuch as it appears that the State of Rhode Island and Providence Plantations has accepted the same, and the said railroad company has delivered and acquiesced in the delivery of the same to the general treasurer of said State, to be and be holden in the place of said surety, it is further ordered, adjudged, and decreed that in the final hearing of this cause, after the evidence herein allowed be completed, the said general treasurer of Rhode Island and Providence Plantations be allowed, upon filing in this court the said certificate of indebtedness, to have and recover and receive from the aforesaid sums in the registry such portion, or the whole of the same, as shall amount to the sum or sums, if any, for which any surety or sureties, and for which the principal obligor on said bond is and would be liable upon the evidence, either for any penalty or damages by reason of the non-performance and breach of the conditions of said bond, and any sum which the said general treasurer of the said State of Rhode Island and Providence Plantations is entitled to recover upon said certificate of indebtedness and hold against the said Boston, Hartford and Erie Railroad Company, its successors and assigns, and all further proceedings in this cause, except the taking of the evidence herein allowed to be taken, are stayed until the further order of court.

By the court.

JOHN G. STETSON, *Clerk.*

49 On the third day of May, A. D. 1878, the treasurer of the City of Boston paid into the registry of the court, under the decree of April 15, 1878, "the sum of $100,000, with interest, at the rate of seven

per cent. per annum, from the twenty-eighth day of June to the first day of December, A. D. 1869," said sum of $100,000 and interest amounting to the sum of one hundred and two thousand nine hundred and seventy-five dollars ($102,975), and received the rece'pt of the register of this court therefor.

This cause was thence continued from term to term to the May term of this court, A. D. 1879, when publication of the testimony was had, and the cause was set down for hearing, and fully heard on the nineteenth day of May, A. D. 1879, before the honorable John Lowell, circuit judge, and on the twenty-first day of May, A. D. 1879, the opinion of the court was read.

This cause was thence continued to the present October term of this court, A. D. 1879, when, to wit, Feb. 25, 1880, the honorable
50 John Lowell, circuit judge, sitting, the following interlocutory decree is entered, namely:

Interlocutory decree.—February 25, 1880.

LOWELL, *J.*

Whereas by the interlocutory decree made in this cause on the fifteenth day of April, A. D. 1878, the question of the liability of the City of Boston to pay interest on the certificate of indebtedness therein specified for the time subsequent to the first day of December, A. D. 1869, was reserved until said city should appear and be heard on the matter:

Now, therefore, the said City of Boston having appeared by John P. Healy, esquire, it is adjudged, ordered and decreed by consent of all parties to this record that the treasurer of said City of Boston, within ten days from this date, pay into the registry of this court the sum of sixteen thousand eight hundred and eighty-nine $\frac{58}{100}$ dollars ($16,889.58) in full satisfaction of the liability of said city to pay interest on said certificate
51 of indebtedness for the time subsequent to the first day of December, A. D. 1869.

On the same day the treasurer of the City of Boston pays into the registry of the court, pursuant to the said decree of February 25, A. D. 1880, the sum of sixteen thousand eight hundred and eighty-nine dollars and fifty-eight cents ($16,889.58).

On the seventeenth day of March, A. D. 1880, the following claim of the State of Rhode Island is filed by the allowance of the court as of April 15, 1878, after the entry of the interlocutory decree of that date.

Claim of State of Rhode Island.—Filed March 17, 1880, *as of Apr.* 15, 1878.

And now comes the State of R. I., by the undersigned, the same counsel who have appeared for the defendant Clark, general treasurer of said State, and, without prejudice to the demurrer of said general treasurer, claims the fund in the registry of the court.

CHAS. HART,
JOHN F. TOBEY,
Of Counsel for the State of R. I.

52 On the first day of May, A. D. 1880, the honorable John Lowell, circuit judge, sitting, the following final decree is entered, namely:

Final decree.—May 1, 1880.

LOWELL, *J.*

This cause having come on to be further heard at the last term of this court, to wit, May 19, 1879, and after due deliberation therein had, the opinion of the court, that the complainants are entitled to a decree for the sum in court, having been read, to wit, May 21, 1879, and this cause having been continued to the present term, and a further hearing having been had as to the allowance of costs, now, to wit, May 1, 1880, it is ordered, adjudged, and decreed that the fund in the registry of this court, in this cause deposited by the clerk under the direction of counsel in this case, but with the assent of, and under control of, and subject to the or-
53 ders of this court, with the New England Trust Company, amounting to one hundred and nineteen thousand eight hundred and sixty-four dollars and fifty-eight cents ($119,864.58), together with the interest which has accrued thereon, amounting to four thousand seven hundred and ninety-eight dollars and twenty cents ($4,798.20), said fund and interest amounting to one hundred and twenty-four thousand six hundred and sixty-two dollars and seventy-eight cents ($124,662.78), be distributed and paid over, as follows:

To Samuel Clark, general treasurer of Rhode Island (or to the State of Rhode Island), one of the defendants, one hundred and twenty-seven dollars and seventy-eight cents ($127.78).

To George M. Barnard, Charles S. Bradley, and Charles R. Chapman, the assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company, complainants, one hundred and twenty-three thousand two hundred and eighty-eight dollars and thirty-eight cents ($123,288.38).

54 To John G. Stetson, clerk of this court, one per centum of the amount distributed by this decree, one thousand two hundred and forty-six dollars and sixty-two cents ($1,246.62).

And it is further ordered that several orders directing the New England Trust Company be drawn by the clerk of this court, and, the same being countersigned and allowed by a judge of this court and duly presented to said New England Trust Company, it is ordered, adjudged, and decreed that said New England Trust Company pay over and distribute said fund, and interest thereon, as directed by said several countersigned and allowed orders.

From this decree the defendants, Samuel Clark, General Treasurer of the State of Rhode Island; and the State of Rhode Island, in open court, claim an appeal to the Supreme Court of the United States, and give a good and sufficient bond that they will prosecute their said appeal
55, 56 to effect, and answer all damages and costs is they fail to make their plea good; and said appeal is allowed by the court.

A true record.

Attest:

JOHN G. STETSON, *Clerk.*

57 The following is the evidence used at the hearing before the court on the nineteenth day of May, A. D. 1879:

EVIDENCE FOR DEFENDANT SAMUEL CLARK.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me.

CHARLES BRADLEY, *Examiner.*

PROVIDENCE, R. I., *Monday, June* 3, 1878.

Present, R. R. Bishop, esq., and Charles S. Bradley, esq., of counsel for complainants; John F. Tobey, esq., and Charles Hart, esq., of counsel for defendant Samuel Clark.

Deposition of John R. Balch.

Direct examination by JOHN F. TOBEY, Esq., of counsel for defendant Samuel Clark.

Int. 1. Please state your age, name, residence, and occupation.

Ans. John R. Balch; age, sixty-nine; reside in Providence; treasurer of the Providence and Worcester Railroad Company for upwards of thirty years.

Int. 2. Through what cities and towns of Rhode Island, if any, does the Providence and Worcester Railroad pass?

(Objected to by R. R. Bishop, of counsel for complainants, for reasons hereinafter stated.)

Ans. Providence and Pawtucket, Lincoln, North Smithfield, Cumberland, Woonsocket, East Providence; seven of them.

58 Int. 3. What is the amount for which the said railroad is taxed by said city of Providence, and each of said towns? Please give the valuation made by the assessors of taxes in each town, and the amount of taxes paid during the years 1872 to 1877, inclusive.

(Objected to by R. R. Bishop as above.)

Ans. That includes about forty or fifty towns. These are the results of examination of bills at our office:

YEAR 1872.

Mass. 22,277.14.

	Valuation.	Amount tax paid.
Providence	$504,936	$6,727 05
No. Providence	155,000	485 33
Lincoln	110,000	1,445 52
No. Smithfield	12,000	84 87
Cumberland	200,000	1,400 00
Woonsocket	178,800	1,620 64

YEAR 1873.

Mass. 22,878.77.

Providence	$505,006	$6,816 15
No. Providence	149,740	615 00
Pawtucket		215 84
No. Smithfield	12,000	72 00
Lincoln	120,000	806 00
Cumberland	200,000	1,981 90
Woonsocket	178,800	1,577 77

YEAR 1874.

22,335.15.	Providence	$545,706	$6,817 50
	No. Providence		817 20
	East Providence	110,000	47 50
	Lincoln	125,000	1,440 00
	Cumberland	215,000	1,400 00
	No. Smithfield	15,000	77 05
			221 67
	Woonsocket	188,800	1,772 88
	Pawtucket	143,200	1,088 85

59

YEAR 1875.

Mass. 23,511.79.	Providence	$534,620	$8,232 83
	Pawtucket	144,100	1,094 38
	Lincoln	125,000	1,126 08
	No. Smithfield	15,000	97 50
	Cumberland	215,000	1,612 50
	Woonsocket	188,821	2,014 50
			202 60
	East Providence	100,000	858 00

YEAR 1876.

Mass. 19,485.92.	Providence	$544,139	$7,521 88
	Pawtucket	144,100	1,094 38
	Lincoln	125,000	1,000 00
	No. Smithfield	15,000	105 00
	Cumberland	223,000	1,397 50
	Woonsocket	191,806	2,197 63
	East Providence	100,000	700 00

YEAR 1877.

Mass. 16,188.35.	Providence	$513,271	$7,593 01
	Pawtucket	115,400	
	Lincoln	125,000	814 34
	No. Smithfield	15,000	86 08
	Cumberland	223,000	1,338 00
	Woonsocket	191,866	1,860 46
	East Providence	95,000	800 00
		$7,613,171	$79,277 40

JOHN R. BALCH.

Cross-examination waived.

Attest:

CHARLES BRADLEY, *Examiner.*

60 *Deposition of John W. Ellis.*

PROVIDENCE, R. I., *June* 3, 1878.

Direct examination by JOHN F. TOBEY, Esq., of counsel for defendant Samuel Clark:

Int. 1. Please state your age, residence, and occupation.

Ans. Thirty-three; Woonsocket; civil engineer.

Int. 2. How long have you been a civil engineer; and how long have you been, if at all, the civil engineer for the Providence and Worcester Railroad?

Ans. Civil engineer thirteen years; Providence and Worcester Railroad about four years.

Int. 3. What is the length of the Providence and Worcester Railroad in the State of Rhode Island from the passenger station in Providence to the State line?

(Objected to for reasons hereinafter stated by R. R. Bishop, counsel for complainants.)

Ans. Seventeen and six-tenths miles.

Int. 4. What would be the length of a railroad located as follows: Commencing at a point near the freight depot of the Hartford, Providence and Fishkill Railroad in the city of Providence; thence running westerly and northerly by a line westerly of the State prison, or a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line and crossing or running near to Leonard's Pond, and thence passing between the villages of Pawtucket and Lonsdale and over and above the Providence and Worcester Railroad; thence continuing to the easterly line of the State, in or near to the village of Valley Falls?

(Objected to for reasons hereinafter stated by R. R. Bishop, for complainants.)

Ans. As well as I can judge, it would be a little more than seven miles.

Cross-examination waived.

JOHN W. ELLIS.

Attest: CHARLES BRADLEY, *Examiner.*

61 *Deposition of Jesse Boynton.*

PROVIDENCE, R. I., *June* 3, 1878.

Direct examination by JOHN F. TOBEY, Esq., of counsel for defendant Samuel Clark:

Int. 1. Please state your age, residence, and occupation.

Ans. Fifty-four; residence, Providence; occupation, contractor.

Int. 2. What experience, if any, have you had in the building of railroads?

(Objected to for reasons hereinafter stated by R. R. Bishop, counsel for complainants.)

Ans. That has been our principal business for the past seven years.

Int. 3. What would have been the expense per mile in 1869, 1870, and 1871 of building a railroad upon the following location: Commencing from a point near the freight depot of the Hartford, Providence and Fishkill

Railroad in the city of Providence; thence running westerly and northerly by a line westerly of the State prison, or a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line and crossing or running near to Leonard's Pond, and thence passing between the villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad; thence continuing to the easterly line of the State, in or near the village of Valley Falls?

(Objected to by R. R. Bishop, counsel for complainants, for reasons hereinafter stated.)

Ans. I can't give a definite answer to that question; I could only give an approximate answer. I should say about $30,000 a mile at that time would be the approximate cost.

No cross-examination.

JESSE BOYNTON.

Attest: CHARLES BRADLEY, *Examiner.*

62 *Deposition of Samuel Clark.*

PROVIDENCE, R. I., *June* 8, 1878.

Direct examination by JOHN F. TOBEY, Esq., of counsel for defendant Samuel Clark:

Int. 1. Please state your age, residence, and occupation.

Ans. I am in my fifty-second year; residence, town of Lincoln, R. I.; general treasurer State of Rhode Island.

Int. 2. How long have you been such general treasurer?

Ans. I was elected in March, 1872, and have been from that time forward.

Int. 3. What amount of money has the State of Rhode Island paid to counsel in the present suit of George M. Barnard et al. against Samuel Clark et al., this case?

(Objected to by R. R. Bishop, counsel for complainants, for reasons hereinafter stated.)

Ans. $2,200.

Int. 4. What was the average expense per day of a session of the general assembly of the State of Rhode Island during the years 1864 to 1869, inclusive?

(Objected to by R. R. Bishop, counsel for complainant, for reasons hereinafter stated.)

Ans. About $200 a day.

Cross-examination waived.

SAMUEL CLARK.

Attest: CHARLES BRADLEY, *Examiner.*

Deposition of Abraham Payne.

PROVIDENCE, R. I., *June* 8, 1878.

Direct examination by JOHN F. TOBEY, Esq., of counsel for defendant Samuel Clark:

Int. 1. Please state your age, residence, and occupation.

Ans. Fifty-nine years old; Providence, R. I.; lawyer.

Int. 2. For how long a time have you practised law in the city of Providence?

63 Ans. Thirty-five years.

Int. 3. Have you any personal knowledge of the proceedings in the general assembly of the State of Rhode Island upon the petition of the Boston, Hartford and Erie Railroad Company for leave and authority to extend their railroad from a point in the city of Providence to the State line, at or near Valley Falls, which, as appears by the agreed statement of facts in this cause, was there pending from 1864 to 1869? If so, please state fully and particularly all that you personally know of the proceedings thereon in said general assembly and before its committees.

(Objected to by R. R. Bishop, counsel for complainants for reasons hereinafter stated.)

Ans. I was counsel with others for the Boston and Providence railroad corporation from the time when the petition was filed until it was granted. The Boston and Providence Railroad opposed the grant upon the ground that the public interest did not require the proposed road; that the grant asked for would unjustly interfere with the rights of the corporation; that the petitioners had no means with which to build the proposed road, and that their only object in seeking the grant was to get into a position by which they could compel the Boston and Providence Railroad Company to make certain concessions or payments in the nature, as they claimed, of blackmail. These questions were debated, and evidence produced in relation to the same from time to time before committees of each house of the general assembly, and discussed in the general assembly itself, until the petition was finally granted upon the stipulation of the petitioners to give a bond conditioned that they should complete the road within a time limited. These debates and discussions occupied much of the time of the general assembly. I kept no books of account at the time, and am unable from memory to state the number of days so occupied, but I do remember that the number was large. The debates in the general assembly were not protracted, but the hearings before the committees were numerous and long, and the general assembly frequently adjourned from day to day to enable committees to sit and hear evidence and counsel upon this petition.

64 I have personal knowledge of many things connected with this petition, but I think of nothing further which seems to me to be pertinent to the issues in this case.

ABRAHAM PAYNE.

Attest: CHARLES BRADLEY, *Examiner.*

Deposition of Benjamin N. Lapham.

PROVIDENCE, R. I., *June* 8, 1878.

Direct examination by JOHN F. TOBEY, Esq., of counsel for defendant Samuel Clark:

Int. 1. Please state your age, residence, and occupation.

Ans. I am a lawyer by profession; fifty-seven years of age; and reside in the city of Providence, R. I.

Int. 2. For how long a time have you practised law in the city of Providence?

Ans. Thirty years.

Int. 3. Have you any personal knowledge of the proceedings in the general assembly of the State of Rhode Island upon the petition of the Boston, Hartford and Erie Railroad Company for leave and authority to extend their railroad from a point in the city of Providence to the State line, at or near Valley Falls, which, as appears by the agreed statement of facts in this cause, was there pending from 1864 to 1869? If so, please state fully and particularly all that you personally know of the proceedings therein in said general assembly and before its committees.

(Objected to by R. R. Bishop, esq., counsel for complainants, for reasons hereinafter stated.)

Ans. I cannot say that I have, if by personal knowledge is meant what took place in my presence, or in which I participated, between those dates.

Int. 4. Please state whether or not you were counsel for the Boston, Hartford and Erie Railroad on their petition to the general assembly for leave to extend their road from a point in the city of Providence to the State line, at or near Valley Falls, at some time between 1864 and 1870.

65 (Objected to by R. R. Bishop, as hereinafter stated.)

Ans. I was counsel for the Boston, Hartford and Erie Railroad in the year 1866, and also in the year 1868, upon matters before the general assembly for leave to amend their charter. In 1866, for the purpose of amending it so as not to go through the town of Gloucester, and so as to allow them to go from Woonsocket to Waterford.

In 1868 I was also counsel for them in a petition for leave to amend their charter. There were a number of amendments that they wanted made at some time during my connection with the matter as counsel. One was to build branches to connect with the Pawtuxet Valley; another to build branches in the northern part of the State, and there was also this matter of building a road or extending the Providence, Hartford and Fishkill road from Providence to the Cumberland line. I was a member of the general assembly from 1863 to 1864, and was chairman of the committee on corporations. During the time that I was so a member of the general assembly and acting as counsel these various matters were discussed and talked about. The times when each matter was discussed and talked about I am unable to state.

Upon outside conversation, by consent of counsel on both sides, my memory has been refreshed so that I can state that the petition for a charter or an amendment of the charter of the Providence, Hartford and Fishkill Railroad was pending before the general assembly in the winter of 1863–1864, and that there were hearings before the committee on corporations of the House of Representatives and that the matter was continued. In 1868 Mr. Hart, Mr. Charles Hart, and Samuel Curry were counsel with me for the Boston, Hartford and Erie Railroad, and although I have no charge on my books specifying that my services were for the purpose of obtaining leave to build this road to the Cumberland line, I have no doubt that services were rendered in connection with that matter in the months of February and March.

On looking further at my memoranda I find on a bundle of papers marked "Papers in relation to the Boston, Hartford and Erie Railroad Company" the words "Josiah D. Richards retains us," and this

66 also refreshes my recollection that these services were in relation to

the extension of the road to the Cumberland line. Mr. Richards was an Attleboro' man, and took an interest in this matter.

(No cross-examination.)

BENJ. N. LAPHAM.

Attest: CHARLES BRADLEY, *Examiner*.

The complainants object to the interrogatories put by the respondent to the *following* witnesses, and numbered as follows: In the deposition of John R. Balch to ints. 2 and 3; in the deposition of John W. Ellis to ints. 3 and 4; in the deposition of Jesse Boynton to ints. 2 and 3; in the deposition of Samuel Clark to ints. 3 and 4; in the deposition of Abraham Payne to int. 3; in the deposition of Benjamin N. Lapham to the ints. 3 and 4, on the ground that the matters by said interrogatories inquired for are immaterial and irrelevant to the issue in the cause, and that said interrogatories are otherwise incompetent, and that, so far as any of said interrogatories undertake to inquire as to proceedings in the general assembly of the State of Rhode Island, the best evidence of such proceedings is not produced.

Attest:

CHARLES BRADLEY, *Examiner*.

EVIDENCE FOR COMPLAINANTS.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me.

CHARLES BRADLEY, *Examiner*.

PROVIDENCE, R. I., *July* 13, 1878.

Present, William C. Loring, esq., of counsel for complainants; John F. Tobey, esq., and Charles Hart, esq., of counsel for defendant Samuel Clark.

Deposition of John W. Ellis.

Direct examination by WILLIAM C. LORING, esq., of counsel for complainants:

Int. 1. Please state your age, name, occupation, and residence.

Ans. John W. Ellis; thirty-three; civil engineer; Woonsocket.

67 Int. 2. Is there any railroad between Woonsocket, Rhode Island, and Daysville, Connecticut?

(Objected to by J. F. Tobey, esq., counsel for defendant, as irrelevant.)

Ans. There is one not finished, known as the New York and Boston Air Line.

Int. 3. When was the construction of that railroad finally abandoned?

(Objected to as above.)

Ans. I think January 1, 1867.

Int. 4. Can you state positively whether it was abandoned before the year 1869?

(Objected to as above.)

Ans. It was.

Int. 5. How far had the work of construction proceeded when it was

abandoned? State as particularly as you can the quality and quantity of work which had been done.

(Objected to as above.)

Ans. On the first five and one-half miles westerly from Woonsocket the grading, masonry, and bridging were finished, with very few exceptions, ready for the laying of the track. The next three and one-half miles sixty per cent. of the grading was completed and a portion of the masonry and bridges. On the next one and a half miles the grading was partially commenced. The remainder of the distance to the State line of Rhode Island there was nothing done excepting the removal of the wood or timber from the line of location.

Int. 6. By whom was this road partially constructed, and who owns it now?

(Objected to as above.)

Ans. It was the New York and Boston Air Line Railroad Company, and the Boston, Hartford and Erie Railroad Company on the construction of it. I suppose the New York and New England Railroad Company own it.

No cross-examination.

JOHN W. ELLIS.

Attest: CHARLES BRADLEY, *Examiner*.

68 *Deposition of Charles E. Ballou.*

PROVIDENCE, R. I., *July* 13, 1878.

Direct examination by WILLIAM C. LORING, Esq., of counsel for complainants.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Charles E. Ballou; forty-eight; Mohegan, R. I., that is the post-office address; woollen manufacturer.

Int. 2. Do you own any land on the line of the proposed railroad from Woonsocket, R. I., to Daysville, Conn.?

(Objected to by J. F. Tobey, esq., counsel for defendant, as irrelevant.)

Ans. I own some land on the old Air Line Railroad, so called.

Int. 3. Where is it situated?

(Objected to as above.)

Ans. Nasonville, formerly called.

Int. 4. Has any part of the railroad been constructed on your land?

(Objected to as above.)

Ans. There has been dirt drawn on to it.

Int. 5. Have you been paid your damages for the dirt drawn on?

(Objected to as above.)

Ans. I have not.

No cross-examination.

CHAS. E. BALLOU.

Attest: CHARLES BRADLEY, *Examiner*.

Deposition of Eddy Keach.

PROVIDENCE, R. I., *July* 13, 1878.

Direct examination by WILLIAM C. LORING, Esq., of counsel for complainants.

Int. 1. Please state your name, age, occupation, and residence.

Ans. Eddy Keach; seventy-eight; farmer; Burrilville, R. I.

69 Int. 2. Do you own any land on the line of the proposed railroad from Woonsocket, R. I., to Daysville, Conn.?

(Objected to as irrelevant by J. F. Tobey, esq., of counsel for defendant.)

Ans. Yes, sir.

Int. 3. Has any part of the railroad been constructed on your land?

(Objected to as above.)

Ans. It has.

Int. 4. How much has been done?

(Objected to as above.)

Ans. The whole distance they take on my land is nine acres and sixteen rods. They have done work on half the distance nearly.

Int. 5. Have you been paid any damages for this work done?

(Objected to as above.)

Ans. I have not.

No cross-examination.

EDDY KEACH.

Attest: CHARLES BRADLEY, *Examiner.*

Deposition of Clovis E. Keach.

PROVIDENCE, R. I., *July* 13, 1878.

Direct examination by WILLIAM C. LORING, Esq., of counsel for complainants:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Clovis E. Keach; fifty-three; Burrilville, R. I.; farmer.

Int. 2. Do you own any land on the line of the proposed railroad from Woonsocket, R. I., to Daysville, Conn.?

(Objected to as irrelevant by J. F. Tobey, esq., of counsel for defendant.)

Ans. I do.

Int. 3. Has any part of the railroad been constructed on your land?

(Objected to as above.)

Ans. It has.

70 Int. 4. How much has been done?

(Objected to as above.)

Ans. The whole amount of land taken has been graded, which is one acre. Twenty-five or thirty feet deep is the cut, cut through the whole of it.

Int. 5. Have you been paid any damages for this work on your land?

(Objected to as above.)

Ans. Nothing at all.

No cross-examination.

CLOVIS E. KEACH.

Attest: CHARLES BRADLEY, *Examiner.*

Deposition of Isaac Walling.

PROVIDENCE, R. I., *July* 13, 1878.

Direct examination by WILLIAM C. LORING, Esq., of counsel for complainants:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Isaac Walling; fifty-nine; Burrilville, R. I.; farmer.

Int. 2. Do you own any land on the line of the proposed railroad from Woonsocket, R. I., to Daysville, Conn.?

(Objected to as irrelevant by J. F. Tobey, esq., counsel for defendants.)

Ans. I don't know at this present day that I own any. I did own some.

Int. 3. Has any part of the railroad been constructed on that land?

(Objected to as above.)

Ans. No; they didn't break the soil; they cut the wood and carried it off.

Int. 4. Have any damages been paid you or your grantee for cutting the wood and carrying it off?

(Objected to as above.)

Ans. No, sir.

No cross-examination.

ISAAC WALLING.

Attest: CHARLES BRADLEY, *Examiner*.

71 72 *Deposition of John A. Wood.*

PROVIDENCE, R. I., *July* 13, 1878.

Direct examination by WILLIAM LORING, Esq., of counsel for complainants:

Int. 1. Please state your name, age, residence, and occupation.

Ans. John A. Wood; sixty years; Burrilville, R. I.; farmer.

Int. 2. Do you own any land on the line of the proposed railroad from Woonsocket, R. I., to Daysville, Conn.?

(Objected to as irrelevant by John F. Tobey, esq., counsel for defendant.)

Ans. I do.

Int. 3. Has any part of the railroad been constructed on your land? If yea, how much?

(Objected to as above.)

Ans. Yes, sir; there has been a short fill made, about two rods in length.

Int. 4. Have they paid you any damages for the filling?

(Objected to as above.)

Ans. No, sir.

No cross-examination.

JOHN A. WOOD.

Attest:

CHARLES BRADLEY, *Examiner*.

73 The following is a true copy of the opinion of the court in accordance with which the final decree in this cause was entered May 1, 1880:

Opinion of the court.—May 21, 1879.

LOWELL, *J.*

The Boston, Hartford & Erie Railroad Company, was chartered by the States of Connecticut and Massachusetts for the purpose of building, acquiring, and operating a railroad from Boston to Willimantic, and from Providence to Willimantic and Fishkill. By an act of the general assembly of Rhode Island, passed in 1869, the corporation was authorized to build a spur, about seven miles in length, between Providence and Valley Falls. By the twelfth section of that act it was not to go into effect unless that company should, within ninety days of the rising of the general assembly, deposit in the office of the general treasurer of
74 the State their bond with sureties satisfactory to the governor of the State, in the sum of one hundred thousand dollars, that they would complete the road authorized by the act before the first day of January, 1872.

The company gave a bond in the required sum, payable to the State of Rhode Island, conditioned to complete the road before the said day. Instead of sureties, they gave to the general treasurer a certificate of deposit with the city of Boston of the sum of $100,000, which was accepted as a sufficient substitute for sureties. The company were made bankrupt in this district in 1870, and never built any part of the road. The treasurer still holds the certificate of the city of Boston.

This bill was filed by the assignees of the company, against the city of Boston, and the general treasurer of Rhode Island, alleging that the bond had not been given within the ninety days, that the directors had no
75 power to give it, that the company had no power to accept the act, that the plaintiffs, as assignees, had a right to redeem the pledge, and praying that the money should be ordered to be paid to them. The city of Boston did not appear. The treasurer of Rhode Island demurred for want of jurisdiction and for want of equity. The demurrer was fully argued before Judge Shepley, and was overruled. The whole case was then heard on an agreed state of facts, and Judge Shepley made an interlocutory decree requiring the city of Boston to pay the money into the registry of the court, declaring that the receipt of the register of the court should be a full discharge of the city against the claims of the general treasurer of Rhode Island and all other persons; ordering that the treasurer of Rhode Island should have sixty days to take evidence in relation to any claim of damages by reason of any breach of the bond to the State of Rhode Island; and that the complainants have thirty days to
76 take evidence in rebuttal; reserving all questions of damages to the final hearing. The money has been paid into court, and the evidence has been taken, and I have now heard the parties upon the record as thus modified.

If the case were not of sufficient consequence to be appealable I should be bound, perhaps, if either party desired it, to review the whole record, in order that the final judgment should be that of the judge who enters the

decree; but as either party may take it to Washington I have not thought it necessary to review the decision of Judge Shepley, and I have not formed any opinion upon the points which he determined one way or the other. I understand his interlocutory decrees, unaccompanied though they were by any written opinion, to decide that this court has jurisdiction, and that the contract was a valid one. I do not understand, nor do the parties, that he definitely decided whether the sum of $100,000,
77 was liquidated damages or not, though he must have inclined to the opinion that they were not, before he ordered the parties to go to the expense of taking testimony upon the amount of damages.

Upon this point, the only one which is left open, I have no doubt. The statute provides for a bond, and a bond was given; and it has been the law of the several States and of the United States from the beginning that the penal sum of a bond is never liquidated damages, but only security for such damages as may be due "according to equity," to quote the act of Congress, Rev. Sts., sec. 961. I feel the force of the argument that the State of Rhode Island must have known that they never could prove actual damage in a case of this kind, and, therefore, they must have intended this sum to be something payable absolutely. But to the legal mind the answer is conclusive that they required a bond, and must have known that the penal sum of a bond is never liquidated damages. Taking a well-known security they must have taken it for what it is, and
78 there is no occasion to speculate upon the motives which induced their action, or upon the contingencies in which some damage to the State might possibly have accrued. We know, as matter of fact, that people are constantly in the habit of annexing penalties to their contracts, such as charter-parties, and even the courts continue to do it as in writs of injunction, and yet the penalty has no effect whatever on the rights of the parties, but is a mere piece of surplusage. It is impossible to hold that this sum of $100,000 was liquidated damages to be paid by the company upon a breach of the bond, whatever the breach may have been, and, therefore, I must ascertain if any damages are proved to have been suffered by the State of Rhode Island, and I am of opinion that no legal damage is shown. It follows that the plaintiffs are entitled to a decree for the sum in court.

(Question of costs reserved.)

Decree for the complainants.

79, 80 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts within the first judicial circuit, certify that the foregoing is a true copy of the record of said circuit court in the cause of George M. Barnard et al., complainants, v. Samuel Clark et al., defendants, lately determined in said circuit court, and of all proceedings therein, and of the opinion of the court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twentieth day of July, A. D. 1880, and of the Independence of the United States the one hundred and fifth.

[SEAL.] JOHN G. STETSON, *Clerk.*

81 Know all men by these presents that we, Samuel Clark, general treasurer of the State of Rhode Island, and the State of Rhode Island, principals, and Charles Hart and John F. Tobey, both of the city and county of Providence and State of Rhode Island, sureties, are held and firmly bound unto George M. Barnard, Charles S. Bradley, and Charles R. Chapman, assignees in bankruptcy of the Boston, Hartford and Erie Railroad Company, a bankrupt corporation, in the full and just sum of one thousand dollars, to be paid to the said assignees, their certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the thirty-first day of May, in the year of our Lord one thousand eight hundred and eighty.

82 Whereas lately at a circuit court of the United States, within and for the district of Massachusetts, in a suit in equity depending in said court between said assignees, complainants, and said Samuel Clark, General Treasurer of the State of Rhode Island, The City of Boston, in the State of Massachusetts, a municipal corporation, and Frederick U. Tracy, of said Boston, treasurer of said city, defendants, and the State of Rhode Island, intervenors and claimants of the fund in court, decree was rendered against the said defendants and the said State of Rhode Island, claimants, and the said defendant, Samuel Clark, General Treasurer as aforesaid, and the State of Rhode , claimants as aforesaid, having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said complainants, citing and admonishing them to be

83 and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said defendant, Samuel Clark, General Treasurer as aforesaid, and the State of Rhode Island, claimants as aforesaid, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

SAMUEL CLARK, [L. S.]
Gen. Treas. of the State of R. I.
STATE OF RHODE ISLAND,
By SAMUEL CLARK, [L. S.]
Gen. Treas.

Signed, sealed, and delivered in presence of—
JOEL M. SPENCER, to sig. of Sam'l Clark.
THOMAS A. JENCKES, to signatures of Charles Hart and John F. Tobey.

STATE OF RHODE ISLAND, &c.
OFFICE OF THE SECRETARY OF STATE,
Providence, June 1, 1880.

84 Pursuant to the provisions of resolutions passed by the general assembly of said State on the 28th day of May, 1880, I, Joshua M. Addeman, secretary of state and keeper of the seal of said State,

have hereunto affixed the seal of said State the day and year above written.

Witness:

JOSHUA M. ADDEMAN,
Secretary of State.

CHARLES HART. [L. S.]
JOHN F. TOBEY. [L. S.]

Approved.

JOHN LOWELL,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 266. Samuel Clark, General Treasurer of the State of Rhode Island, and the State of Rhode Island, appellants, vs. George M. Barnard, Charles S. Bradley, and Charles R. Chapman, assignees in bankruptcy of the Boston, Hartford & Erie Railroad Co. Massachusetts C. C. U. S. Filed 15th September, 1880.

FILED
MAR 22 1933
JAMES H. McKENNEY, Clerk

108-436

APPELLANTS' BRIEF.

SUPREME COURT OF THE UNITED STATES.

No. 266.

SAMUEL CLARK, GENERAL TREASURER OF THE STATE OF RHODE ISLAND, AND THE STATE OF RHODE ISLAND, APPELLANTS.

vs.

GEORGE M. BARNARD, CHARLES S. BRADLEY, AND CHARLES R. CHAPMAN, ASSIGNEES IN BANKRUPTCY OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

CHARLES HART,
WILLIAM G. ROELKER,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 266.

SAMUEL CLARK, GENERAL TREASURER OF THE STATE OF RHODE ISLAND, AND THE STATE OF RHODE ISLAND, APPELLANTS.

vs.

GEORGE M. BARNARD, CHARLES S. BRADLEY, AND CHARLES R. CHAPMAN, ASSIGNEES IN BANKRUPTCY OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLANTS.

I.

STATEMENT OF THE CASE.

This is an appeal from the final decree of the Circuit Court of the United States for the District of Massachusetts, in a cause in Equity.

The Boston, Hartford and Erie Railroad Company was chartered by the States of Connecticut and Massachusetts for the purpose of building, acquiring and operating a railroad from Boston to Willimantic, and from Providence to Willimantic and Fishkill.

In the year 1864 the Directors of the Boston, Hartford and Erie Railroad Company applied to the General Assembly of the State of Rhode Island for authority to build an additional piece of railroad about seven miles in length from Providence to Valley Falls, within the limits of that State.

Exhibit A, Record, p. 14.

The Assembly passed the act prayed for in 1869, but provided in the 12th section of the act, that it should not go into effect unless the said railroad company within ninety days from the rising of that General Assembly, deposit in the office of the General Treasurer of the State of Rhode Island, their bond, with sureties satisfactory to the Governor of the State in the sum of $100,000 that they would complete their said road before the first day of January, 1872.

Exhibit B, Record, pp. 20–25.

The Directors of the Railroad Company filed with the General Treasurer of the State of Rhode Island, June 24, 1869, a bond in the sum of $100,000, conditioned, that they should complete their said railroad before the first day of January, 1872. The bond was executed by the Boston, Hartford and Erie Railroad, by John S. Eldridge, its president, and as surety the road delivered to the General Treasurer of the State of Rhode Island a certificate of indebtedness of the city of Boston, which certified that there would be due from the city of Boston after December 1, 1869, to the General Treasurer of the State of Rhode Island, the sum of $100,000, with interest at the rate of seven per cent. per annum.

This certificate of indebtedness was accepted by the then governor of Rhode Island as satisfactory security of said bond and the condition thereof, according to the intent and meaning of the Act of the General Assembly.

No railroad nor part of any railroad was ever built under said Act of said Assembly.

Exhibits C, D, E, pp. 25–27, Record.

The Boston, Hartford and Erie Railroad Company were made bankrupt in the Massachusetts District in 1870.

Bill of Complaint, Record, p. 3.

The State Treasurer of Rhode Island still holds the certificate of the city of Boston.

This bill was filed by the assignees of the company against the city of Boston and Samuel Clark who was then, and is now, General Treasurer of Rhode Island, alleging that the bond had not been given within the ninety days from the rising of the General Assembly; that the directors had no power to give the bond; that the Company had no power to accept the act; that the plaintiffs as assignees had a right to redeem the pledge, and praying that the money should be ordered to be paid to them.

The city of Boston did not appear.

Samuel Clark, the General Treasurer of Rhode Island, demurred for want of jurisdiction, and of Equity.

Record, p. 6.

The demurrer, after argument, was overruled by Judge Shepley.

Record, p. 8.

The General Treasurer, Clark, thereupon filed his answer.

Record, pp. 8–12.

And the case was then heard upon the Bill, Answer of Clark and an agreed statement of facts, and Judge Shepley made an interlocutory decree (see Record, pages 29, 30,) requiring the city of Boston to pay the money into the Registry of the Court, declaring that the receipt of the Register of the Court should be a full discharge of the city against the claims of the General Treasurer of Rhode Island and all other persons; ordering that the General Treasurer of Rhode Island should have sixty days to take evidence in relation to any claim for damages by reason of any breach of the bond to the State of Rhode Island; and that the complainants have thirty days to take evidence in rebuttal; reserving all questions of damages to the final hearing.

The money was thereupon paid into the Registry of the Circuit Court by the city of Boston.

See Record, pp. 30, 31.

And the State of Rhode Island, without prejudice to the demurrer of Clark, General Treasurer, filed a claim to the fund in the Registry of the Court.

See Record, p. 31.

And thereupon evidence was taken on both sides.

See Record, pp. 33–42.

The substance of this testimony was that no railroad, nor any part of it, was ever built under the charter in question; but that some cutting and filling was done, and surveying of the proposed line; no land damages were ever paid.

It also appeared that the petition of the Boston, Hartford and Erie Railroad Company for the grant in question, from the time it was filed in 1864, until it was granted in 1869, was opposed before the General Assembly by the Boston and Providence Railroad Company on the ground that the public interest did not require the proposed road; that the grant asked for would unjustly interfere with the rights of the Boston and Providence Railroad Company; that the petitioner, the Boston, Hartford and Erie Company, had no means with which to build the proposed road, and that their only object in seeking the grant was to get into a position by which they could compel the Boston and Providence Railroad Company to make certain concessions or payments in the nature of blackmail. These questions were debated and evidence produced in relation to the same, from time to time, before committees of each house of the General Assembly, and discussed in the General Assembly itself, until the petition was finally granted upon the stipulation of the petitioners to give a bond conditioned that they should build their road within a time limited.

See Deposition of Abraham Payne, Record, p. 37.

The cause was then finally heard by Judge Lowell, Judge Shepley having died in the meantime.

Judge Lowell did not deem it necessary to review the decisions of Judge Shepley upon the points which he determined in his interlocutory orders, to wit: that the Court had jurisdiction of the cause, and that the contract made was a valid one, and not *ultra vires*.

He proceeded to consider only the remaining questions in the cause, to wit: whether the sum of one hundred thousand dollars was to be considered as liquidated damages, or as a penal sum to be chancered according to Equity. And whether in case he should determine it to be a penal sum, any damages had been proved to have been suffered by the State of Rhode Island.

After argument Judge Lowell decided that the $100,000 were not liquidated damages, and that no legal damages had been proved.

See Opinion of Lowell, J., Record, pp. 43, 44.

He thereupon entered a final decree directing that the fund in the Registry of the Court be paid over to the complainants.

See Final Decree, Record, p. 32.

And thereupon the General Treasurer, Clark, and the State of Rhode Island, took this appeal to this Honorable Court.

II.

ASSIGNMENT OF ERRORS.

The appellants, as specifically as may be, state that the said Decree of the said Circuit Court of the United States for the District of Massachusetts, from which they have appealed, is erroneous in this:

First. Because the said Bill of Complaint should have been dismissed as against the Respondent, Samuel Clark, General Treasurer of the State of Rhode Island, inasmuch as it is apparent upon the face of the said Bill of Complaint that it is in substance and effect a suit against the State of Rhode Island, and that the said Clark has no interest in the said suit or in the subject matter thereof, except in his official capacity aforesaid, and inasmuch as the judicial power of the United States does not extend to suits in law or equity commenced or prosecuted against one of the United States by a citizen or citizens of another State.

Second. Because it should have been determined by said decree that said sum of one hundred thousand dollars in said bond mentioned, was named therein as a fixed stipulated penalty under the Statute as liquidated damages, and not as a penal sum, and said sum in Court should have been ordered paid to these appellants, or one of them, and not to the complainants in said Bill of Complaint.

Third. Because it should have been determined by said decree that these appellants, or the appellant State of Rhode Island, had proved that it had suffered legal damage from the breach of said bond to the extent of the amount of the said fund in the Registry of the said Court, and that the same be paid to it or them, and not to the appellees, the complainants in said Bill of Complaint.

III.

POINTS OF LAW AND FACT.

We shall proceed to consider the points in the case, in the following order and under the following heads:

First. Whether the Circuit Court had jurisdiction of the cause as against the respondent Clark, the General Treasurer?

Second. Whether the contract made by the Boston, Hartford and Erie Railroad Company, by the deposit of the bond and certificate of indebtedness of the city of Boston with the General Treasurer of Rhode Island was a valid contract and binding upon the corporation and upon these complainants, as its assignees, or whether it was *ultra vires* and void?

Third. Whether the sum of $100,000 named in the bond, was intended as a fixed stipulated penalty under the Statute or as liquidated damages, or as a penal sum as security for any damages which the State of Rhode Island might suffer in consequence of the breach of the bond?

Fourth. Whether the State of Rhode Island has proved any legal damage in consequence of the breach of the bond, and if so, how much?

First Question.

Whether the Circuit Court should have dismissed the cause as against the Respondent Clark, the General Treasurer of the State of Rhode Island, for want of jurisdiction, inasmuch as it is apparent upon the face of the record that this is in substance and effect a suit against the State of Rhode Island, and that Clark has no individual interest therein?

We submit that this being a suit against the State of Rhode Island by complainants suing in right of a citizen of other States than the State of Rhode Island must be dismissed for want of jurisdiction in the Court, under Article XI of amendments to the Federal Constitution.

That the party in whose right the complainants sue is a citizen of other States than the State of Rhode Island, appears from the statement in the bill that said party was chartered by the States of Connecticut and Massachusetts.

1. The State of Rhode Island, though not made defendant *eo nomine*, is yet unmistakably pointed at by all the statements and charges of the bill as the real party defendant, as well by its alleged acts as its evident and sole pecuniary interest. A State being an artificial person, can act or negotiate or be negotiated with in respect to any kind of business only by or through her public agents, organs of authority, or official representatives. As in this case the complainants' bill states that the State by its General Assembly—that is, by its Legislature—granted a franchise, limited to take effect on a condition to be performed by a transaction with the State's general treasurer, to the satisfaction of her chief magistrate, the governor; that for performance of this condition the grantee of the franchise deposited its bond, with a pledge of the paper A mentioned in the complainants' bill, with the State's general treasurer, which was accepted by the governor as satisfactory performance of the condition on which the franchise was to take effect, and the act of the governor was subsequently approved by resolution of the General Assembly; also that Samuel Clark, the nominal defendant, came into possession of said bond and paper A merely in virtue of his succession to the office of general treasurer of the State of Rhode Island.

These are statements and charges of the complainants' bill, elucidated and confirmed by Clark's answer.

The State performed all these several acts as a State in the only way and by the only means by which a State can ever perform any act or negotiate any kind of business, that is, by her own proper official agents and representative organs of authority. The State demanded a bond,—a bond with sureties, and the State accepted a bond with a pledge of

paper A as a substitute for sureties, and the condition of the bond having been broken, the State now holds and claims the paper A as its own property by forfeiture.

Samuel Clark's answer, Exhibits B, C and D, pp. 8, 9, 10, 11, 12, 20–27, Record.

2. We therefore confidently submit to the Court as the necessary intendment and logical conclusion from all the statements and charges of the bill, that the State is thereby made the real party defendant both in action and in interest. The complainants' bill is always necessarily the record of the cause or the basis on which the record is founded, and by this test the State, and not its agent Clark, is seen to be the real party defendant.

3. But there is no need of having recourse to logical inference or deduction to ascertain who is the real defendant in the cause. The bill itself in the plainest manner shows that the issue is directly between the complainants and the State of Rhode Island. In the last paragraph, (Record, page 4,) printed bill, the complainants charge that they had "made due application to the State of Rhode Island and to the General Assembly thereof for this paper A and for an assignment of it to them, but which application had not been granted, and that instead thereof said General Assembly of the State of Rhode Island had passed a resolve authorizing and instructing its general treasurer to collect the moneys on said paper A."

Clark's answer, Exhibit B, p. 8, p. 20.

4. This paper A is in legal form and effect the property of the State of Rhode Island. It is payable, not to the nominal defendant Samuel Clark, but to the General Treasurer of the State of Rhode Island. When, therefore, the bill prays that the "respondent Clark may be decreed to have no right, title or interest in or to the paper A or the moneys payable thereon," this must be understood as a prayer for a decree that the State of Rhode Island has no right, title or interest in or to that paper or in the moneys payable thereon, and so the prayer that Clark may be decreed to assign and deliver that paper to the complainants, and that he may be enjoined from collecting or receiving the money due thereon, can only mean that he be so decreed and enjoined in his representative capacity of General Treasurer of the State of Rhode Island. This therefore in legal intendment and effect is a prayer that the State of Rhode Island be enjoined and restrained by decree of this Court, at the suit of complainants, suing in right of a citizen of other States than the State of Rhode Island. The claim is made on Samuel Clark wholly by reason of his holding the office of General Treasurer of the State; no decree can be made against him personally, and it would be wholly nugatory if it should be; for personally Samuel Clark has no more right to negotiate this paper than his predecessor in office, Samuel Parker, who is now in his grave. The State of Rhode

Island must therefore be considered the real party defendant in the cause, as she is certainly made such party on the record.

When the suit is against the general treasurer of a State, for money which came to his hands as such officer of a State, and no decree can be pronounced against him personally, the State must be considered as the real defendant.

Gov. of Georgia v. *Madrazo*, 1 Pet. 110.

The question is not one of the dignity of the offices, but of the representatives of the State, *pro hac vice*.

In the application of the principle, there is no difference between the governor and State officers of a lower grade. In this respect they are on an equality.

Davis v. *Gray*, 16 Wal. 203, 221.

Where a suit is prosecuted in a Federal Court by a private party against a State officer, in which the State has a direct interest but cannot be made a party, the officer himself must have an interest or liability in the subject matter, on which the jurisdiction of the Court can attach; and where such a suit is prosecuted against a State officer having no such interest or liability in his official capacity to affect the right of a State, the State is the real party defendant within the prohibition of the eleventh article of amendment to the Constitution of the United States.

State ex rel. Drake Doyle, Sec. of State, 40 Wis. 210, 211.

Since the taking of the appeal in the case at bar, this Honorable Court has given an opinion in the cases of *United States* v. *Lee* and *Caufman* v. *Lee*, known as the "*Arlington*" cases.

We are aware that there are *dicta* in the opinion of the majority of the Court in those cases which seem to be adverse to the view which we are now contending for.

But we respectfully submit, that the remarks contained in that opinion were merely *dicta*, and not necessary to the decision of the question before the Court in those cases.

In that opinion the question then before the Court is said to be involved in the following principle:

"This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property, held by such persons as officers or agents of the Government.

And the settlement of the questions involved in this proposition is thereupon said to depend upon general principles of law, derived from our English ancestors. And the opinion proceeds to define the origin and limitations of those principles of law.

But the determination of the question now before this Honorable Court depends not upon general principles of law derived from our English ancestors, but upon a positive provision of the Constitution. And this provision was not originally incorporated into the Constitution, but is an amendment to it.

It constitutes a direct restriction upon the judicial power of the United States.

Historically it is well known that the amendment was adopted for the express purpose of so restricting that power in consequence of the decision of this Court in Chisholm v. Georgia, 2 Dall. 469.

We respectfully submit, as counsel before this Honorable Court, representing one of the States in the Union, the preservation of whose rights from the encroachments of neighbors and of the Federal Government rests entirely with this Tribunal, that this provision should be strictly construed.

If this suit can be maintained, no case can arise in which the provisions of the amendment may not be in effect nullified by suing the officers, agents and servants of the State, instead of suing the real party, the State itself.

In this case the Record shows that the sole interest is in the State of Rhode Island.

Clark, the Treasurer, has no personal interest. He has violated no injunction of a United States Court. He has committed no tort towards the complainants. The bill shows that the complainants have never demanded the surrender of the certificate of indebtedness of the respondent Clark. They have demanded it of the State of Rhode Island.

The certificate of indebtedness is not in the personal possession or control of the respondent Clark, but in the General Treasury of the State.

There is no question under the Constitution of the United States, or any treaty or law of Congress involved in the case.

One or all of these elements were present in *Bank* v. *Osborn*, and in every case in which this question has been considered by this Court.

We beg to refer for a clear and concise statement of the distinction. We desire to point out, to the following passages in the dissenting opinion of Mr. Justice Gray in the *Arlington* cases above quoted:

"The decision of this court and the reasoning of the several judges in the case of Chisholm vs. Georgia, 2 Dall., 419, in which a majority of the court held that under the Constitution, as originally adopted, a suit could be maintained in this court against a state by a citizen of another state do not appear to us to furnish much aid in the determination of this case for several reasons: 1st. Each of the judges who mentioned the subject declined to affirm that the United States could be sued. (2 Dall. 430, 469, 478.) 2d. The decision was based on a construction of the words of the Constitution conferring jurisdiction of suits between 'a state and citizens of another state.' 3d. That construction was set aside by the eleventh amendment of the Constitution, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.' (2 Dall. 480 note; Hollingsworth vs. Virginia, 3 Dall. 378.)

In those cases in which judgments have since been rendered by this Court against individuals concerning money or property in which a state had an interest, either the money was in the personal possession of the defendants and not in the possession of the state, or the suit was to restrain the defendants by injunction from doing acts in violation of the Constitution of the United States. Within one or both of these classes fall the cases of the United States vs. Peters, 5 Cranch, 115; Osborn vs. Bank of United States, 9 Wheaton, 738; Davis vs. Gray, 16 Wall., 203; and Board of Liquidation vs. McComb, 92 U. S. 531.

In United States vs. Peters, 5 Cranch, 115, in which a writ of mandamus was ordered to a District Court of the United States sitting in Admiralty to issue an attachment against the executrixes of David Rittenhouse to enforce obedience to a decree of that Court for the payment of money, (although Rittenhouse had been treasurer of the State of Pennsylvania and the Legislature of that State had directed its attorney-general to sue the executrixes for the recovery of the money, and the Governor to protect them against any process of the Federal Courts,) the judgment of this Court, as stated by Chief Justice Marshall, went upon the ground that it was apparent that Rittenhouse held the money in his own right, and "that the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceeding of the court and prevent their looking

into the suggestion and examining the validity of the title." The Chief Justice stated the conclusion of the court as follows: "Since, then, the State of Pennsylvania had neither possession of, nor right to the property on which the sentence of the District Court was pronounced, and since the suit was neither commenced nor prosecuted against the state, there remains no pretext for the allegation that the cause is within the amendment of the Constitution, which has been cited; and consequently the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."

The Chief Justice thus carefully avoided expressing an opinion upon a case in which the money sued for was in the possession of the state, or "the actual property of the state, however wrongfully acquired"; and his remark upon the effect of a mere suggestion of the title in the state in a suit to recover "property in possession of an individual"—as well as his similar remark in Osborn vs. Bank of the United States, 9 Wheat., 738, 870, as to the effect of a suggestion of title in a foreign sovereign under like circumstances—can have no application where it is in due form pleaded or suggested and satisfactorily proved or admitted, that the property is in the possession of the state or the sovereign, under claim and color of title, though that possession is necessarily held in its behalf by its officers or servants, as appears by his own judgment in the case of the Exchange, as well as by the cases in the Court of Exchequer, before cited.

In Osborn vs. Bank of the United States, 9 Wheat., 738, the bill was originally filed by the Bank of the United States against the Auditor of the State of Ohio and a collector employed by him, to prevent them from levying a tax imposed by the Legislature of that State in violation of the Constitution of the United States upon the property of the bank; and they, after the service of the subpœna, forcibly took from the plaintiff's office the amount of the tax in money, and paid it over to the treasurer of the state, who received it with notice of these facts and kept it apart from other money belonging to the state, so that, in the view taken by the court, it had never come in the possession of the state, but would have been recovered from the treasurer in an action for detinue, (9 Wheat., 833–836, 854, 858.) By an amendment of the bill the treasurer was made a defendant. Such were the facts upon which the court, by one of Chief Justice Marshall's most elaborate judgments, in which the case was admitted to be one of great difficulty, ordered the defendants to restore the money, and held that the fact that the state was not, and could not be without its consent, made a defendant afforded no objection to granting such relief.

The dictum of the learned justice who delivered the opinion in Davis vs. Gray, 16 Wall., 203, 220, that in Osborn vs. Bank of the United States, it was decided, in cases in which a state is concerned, "that it cannot be made a party is a sufficient reason for the omission to do it, and the court may proceed against the officers of the state in all respects as if the state were a party to the record, overstates the decision in Osborn's case; goes beyond what was required for the decis-

ion of Davis vs. Gray, in which the object of the suit and the whole effect of the decree were to prevent the Governor and the Commissioner of the General Land Office of the State of Texas from signing patents for lands of which the plaintiff had the title under a previous grant from the state; and, as the state cannot hold money or property otherwise than by its officers and agents; would, if understood as laying down a universal rule, practically nullify the eleventh amendment of the Constitution.

In the Board of Liquidation vs. McComb, 92 U. S., 531, in which an injunction was granted to restrain the Board of Liquidation consisting of the Governor and other officers of the State of Louisiana from issuing and using, in violation of a previous contract of the state with the plaintiff, bonds of the state in their hands, the court said that the objections to proceeding by injunction were, "First, that it is, in effect, proceeding against the state itself; and secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of execution officers in matters belonging to the proper jurisdiction of the latter." And the ground upon which the bill in that case as well as in the previous cases of Osborn vs. Bank of the United States, and Davis vs. Gray, was sustained, was defined to be that when a plain official duty, requiring no exercise of discretion, is threatened to be violated by some official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it, notwithstanding the officer pleads the authority of an unconstitutional, and therefore void, law for the violation of his duty.

The case of the Governor of Georgia vs. Madrazo, 1 Pet., 110, does not appear to us to have any important bearing, except as tending to illustrate the distinction between the possession of the state by its agents and the possession of the agents in their own right. The decision was, that where negro slaves were illegally taken from the owner, on the high seas were afterwards sold to a stranger, who, without the privity of the owner, imported them into the United States in violation of the act of Congress of March 2, 1807, ch. 22, and then were here seized by an officer of the customs of the United States and delivered to an agent appointed by the Governor of the State of Georgia in conformity with the act of Congress, and some of them sold by order of the Governor of the State, and the money obtained at the sale, was, in the words of Chief Justice Marshall, "actually in the treasury of the state, mixed up with its general funds," and the rest of the slaves remained in the hands of the agent of the state "in possession of the government," a libel in admiralty by the owner to recover possession of the money and slaves, though not brought against the state by name, but against the governor in his official capacity, was a suit against the state, and therefore, by reason of the eleventh amendment of the Constitution could not be maintained. (See also ex parte Madrazo, 7 Pet., 627.)

Second Question.

Was the contract made by the Boston, Hartford and Erie Railroad Company, by the deposit of the bond and certificate of indebtedness of the city of Boston with the General Treasurer of Rhode Island, valid and binding upon the corporation and upon these complainants as its assignees, or was it ultra vires and void?

Several objections were urged by the appellees in the court below to the validity of the contract, which we will proceed to consider.

First Objection. That the bond called for by the statute was not filed within ninety days, as required, and that consequently the statute has never gone into effect.

The Rhode Island act provided in

SECT. 12. This act shall not go into effect unless the said Boston, Hartford and Erie Railroad Company shall, within ninety days from the rising of this General Assembly, deposit in the office of the general treasurer their bond, with sureties satisfactory to the governor of this State, in the sum of one hundred thousand dollars, that they will complete their said road before the first day of January, A. D. 1872.

See Record, p. 25, Exhibit B.

The General Assembly rose March 26, 1869, and the bond was filed June 24, 1869, which was within ninety days, if the day of the rising of the General Assembly is excluded, as it should be.

The general rule, as laid down by Lord Mansfield in *Pugh* v. *Leeds*, Cowp. 714, and approved by the Supreme Court of the United States in *Griffith* v. *Bogert*, 18 How. 163, is "that courts of justice ought to construe the words of parties so as to effectuate their deeds, and not destroy them; and that 'from' the date may, in vulgar use, and even in strict propriety of language, mean either inclusive or exclusive."

In the said case of *Griffith* v. *Bogert*, where the statute prohibited the selling of the lands of a deceased debtor under execution, until after the expiration of eighteen months from the date of letters of administration, and a sale had been made which could not have been held to be made after the expiration of such eighteen months, unless the day of the issuing of such letters was included, such day was included in computing the eighteen months. But the Court there say (18 How. 163), "If the statute in question was one of limitation, whereby the remedy of the creditor would have been lost unless execution had issued and sale been made within the eighteen months, probably a different construction might have prevailed."

Moreover this case is governed by the statute law of the State of Rhode Island, which is explicit on this subject.

See R. I. Revised Statutes, chapter 22, p. 44, "Of the Construction of Statutes, § 12: "When time is to be reckoned from any day, date or act done, or the time of any act done, such day, date or the day when such act is done shall not be included in such computation."

And this statute is simply affirmatory of the general law on this subject in this country, well settled by numerous authorities.

Windsor v. *China*, 4 Maine, 298.
Homes v. *Smith*, 16 Maine, 181.
Page v. *Weymouth*, 47 Maine, 238.
Henry v. *Jones*, 8 Mass. 453.
Bigelow v. *Wilson*, 1 Pick. 485.
Wiggin v. *Peters*, 1 Met. 127.
Rand v. *Rand*, 4 N. H. 267.
Weeks v. *Hull*, 19, Conn. 376.
Long v. *Phillips*, 27. Ala. 311.
Bowman v. *Wood*, 41 Ill. 203.

Second Objection. That the Boston, Hartford and Erie Railroad corporation *could* not accept the act of the State of Rhode Island because the company was incorporated by the State of Connecticut, and because, say the appellees, the State of Connecticut never authorized the company to build or to buy the road in Rhode Island provided for by the Rhode Island act.

The answer to this is, that whether the Boston, Hartford and Erie Railroad Company had authority under their Connecticut act of incorporation to accept the Rhode Island act and build the road, or not, is immaterial.

1. Because the company had long been incorporated in Rhode Island.

The Boston, Hartford and Erie Railroad claiming to act under power conferred upon it by its Connecticut charter, purchased the Railroad of the Providence, Hartford and Fishkill Railroad Company extending into the State of Rhode Island.

See Record, p. 29.

Thereupon the General Assembly of Rhode Island passed the following act:

An Act to ratify and confirm the sale of the "Hartford, Providence and Fishkill Railroad" to the "Boston, Hartford and Erie Railroad Company."

It is enacted by the General Assembly as follows:

Section 1. The sale and transfer of the Hartford, Providence and Fishkill Railroad, its property and franchises to the Boston, Hartford and Erie Railroad Company, a corporation created by the General Assembly of the State of Connecticut, as evidenced by the deed of said Hartford, Providence and Fishkill Railroad Company, dated the 28th day of August, 1863, and recorded in the city clerk's office of the city of Providence in Book No. 167, page 13, of the records of deeds of real estate in said city, is hereby ratified and confirmed, so far as said railroad is situated in this State; and said Boston, Hartford and Erie Railroad Company, by that name, shall, and may have, use, exercise, and enjoy all the rights, privileges, and powers heretofore granted and belonging to said Hartford, Providence and Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of the State. And said Boston, Hartford and Erie Railroad Company, in the transportation of freight or passengers to and from any point or place in Rhode Island, to and from any point or place westerly of Willimantic on the line of its railroad, built or to be built, any part of which shall be located in this State, shall not charge a greater rate for the whole distance than to and from any point or place in Massachusetts, to and from the same points or places westerly of Willimantic.

Section 2. One or more of the directors of said Boston, Hartford and Erie Railroad Company, shall, at all times, be an inhabitant of this State, on whom process against said company may be lawfully served; and said company shall be held to answer in the jurisdiction where the service is made and the process is returnable.

Section 3. Nothing in this act contained, shall in any manner affect any liens or mortgage upon the railroad of said Hartford, Providence and Fishkill Railroad Company, or on the property and franchises thereof, or in any manner impair the rights of any creditor of said Hartford, Providence and Fishkill Railroad Company, nor shall the rights or position of any creditor be in any way changed or affected by anything contained in this act, nor shall the rights or position of any claimant for damages for any tort be thereof affected.

Section 4. Said railroad, its property and franchises may be taken and sold on execution issued against said Hartford, Providence and Fishkill Railroad Company, for any liabilities existing or contracted at the time of the sale and transfer thereof, mentioned in the first section of this act, in the same manner and with the same effect as if this act had not been passed: Provided, that in all suits commenced against said Hartford, Providence and Fishkill Railroad Company after this act shall

take effect, service shall also be made upon said Boston, Hartford and Erie Railroad Company.

Section 5. This act shall not take effect until accepted by a vote of the stockholders of said Boston, Hartford and Erie Railroad Company, at a stockholders meeting specially called for that purpose.

See Rhode Island Acts of General Assembly, January Session, 1865.

This act does not appear in the Exhibits, but by the agreed statement of Facts, Record, page 13, it is provided as follows, viz.:

"The statutes of any of the States affecting the Boston, Hartford and Erie Railroad, or any of the Railroads of which it was formed, or any railroad connected therewith, may be referred to."

It appears that sometime prior to 1864, there were two corporations, one in Connecticut, and one in Rhode Island, referred to already—one called the Hartford, Providence and Fishkill Railroad Company, a corporation created by the Legislature of Connecticut, and which could not of course extend its grant into Rhode Island; and the other a corporation having a charter granted by the State of Rhode Island authorizing the construction of a railroad from Providence, westward to Plainfield, in the direction of Hartford. And subsequently those two corporations were, by the Acts of the Legislatures of Connecticut and Rhode Island, authorized to become merged and consolidated under the name of the Hartford, Providence and Fishkill Railroad, the line to be constructed from Providence to Fishkill, on the Hudson River. That being the state of the case, subsequent thereto the Legislature of Connecticut creates another corporation called the Boston, Hartford and Erie Railroad Company, giving it certain powers to construct roads, and also to buy up the railroads in existence, not only in that State, but in other States, or to connect with the railroads in other States.

Subsequently, the Hartford, Providence and Fishkill Railroad Company, so-called, as it appears by the facts agreed upon, sold its franchises and property to the Boston, Hartford and Erie Railroad Company,—it being borne in mind that the Hartford, Providence and Fishkill Railroad Company then consisted of a corporation running a railroad from Providence into Connecticut and to Fishkill on the Hudson River, originally composed of corporations created by the States, but consolidated and united by consent and Act of the two Legislatures; so that the road that the Boston, Hartford and Erie Railroad Company were dealing with was a corporation of that character. The Hartford, Providence and Fishkill Railroad Company assumed to dispose of their franchises and their property to the Boston, Hartford and Erie Railroad Company. The Act of the two corporations was ratified by the Legislature of Connecticut, and also by the Legislature of Rhode Island. The charter under which this question arises, and under which this bond was deposited, and which is "Exhibit B," on the twentieth page

of the Record, is entitled "An Act in addition to an Act entitled an Act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company."

We submit, then, as a matter of law, that when this act was passed in 1869, (Exhibit B, Record, page 20,) the Boston, Hartford and Erie Railroad Company had then become a corporation in Rhode Island in place, so far as Rhode Island was concerned, of the Hartford, Providence and Fishkill Railroad.

That it was entirely competent for the State of Rhode Island to give to the corporation the functions, powers and franchises to do things, e. g., to build this piece of road *within the State of Rhode Island*, which may be *ultra vires* so far as its franchises are concerned in the State of Connecticut under its original Connecticut Charter.

2. This appellant's answer shows that the corporation was bound, by its contract of purchase of the railroad of the Hartford, Providence and Fishkill Railroad Company, to construct without delay the identical piece of railroad in Rhode Island authorized by this act.

Exhibit K, Record, p. 29.
Answer, Record, p. 10.

Third Objection. That the Directors of the Boston, Hartford and Erie Railroad Corporation had no authority either to apply to the General Assembly of Rhode Island for the act of 1869, nor to file the bond of the corporation or the certificate of the city of Boston, with the General Treasurer of Rhode Island.

To this we say

1. The case made by the bill and answer shows not only that the directors had authority, but that it was their duty to have applied for and secured the passage of said act, and to have given the bond of said corporation, and to have used the necessary amount of its funds to insure the act's going into effect; besides that the answer shows that the proceedings of the directors were ratified and approved by subsequent acts and votes of the corporation and its stockholders.

2. This defendant's answer discloses circumstances from which knowledge and approval on the part of the corporation and its stockholders of the application by the directors for the passage of the act, whilst the application for it was pending, will and must be inferred. (Exhibit A, and answer, pp. 9, 10 and 13 to 19, Record.)

Bank U. S. v. *Dandridge*, 12 W. 64.

3. The acceptance of the act by the stockholders at their annual meeting, Sept. 8, 1869, subsequent to the giving of the bond and pledge therewith of paper A, must, we think, be taken as a ratification of the

proceedings of the directors in procuring the passage of the act, as also on giving the bond and pledge of paper A, necessary to insure its taking effect. (This, defendant's answer, pp. 10, 11, Record.)

Grants beneficial to a corporation will be presumed to have been accepted.

A. & A. on Corporations, Ch. II, § 83.
Charles River Bridge v. *Warren Bridge*, 7 Pick. 344.
1 Redf. on Railways, *69, § II, 4.

But we have in this case evidence of express acceptance of the Act. The complainants appeal to the records of the corporation. (Bill, p. 3.) This defendant joins in that appeal. (Answer, p. 11, Record.) The result is the following extracts from the records, which will be admitted as authentic by our brothers, counsel for the complainants, who have access to those records: —

"Notice.— The Annual Meeting of the stockholders in the Boston, Hartford and Erie Railroad Company will be held at the office of the company, No. 12 Pemberton Square, Boston, in Massachusetts, on Wednesday, the 8th day of September, 1869, at 12 o'clock, noon, for the following purposes, to-wit: 1st, The choice of directors and other lawful officers for the year ensuing; 2d, To see if the company will accept the acts and grants of the Legislatures of Connecticut, Rhode Island and Massachusetts; 3d, To do any other lawful business.

Boston, August 16, 1869.

Signed, H. A. Otis,

Secretary.

See Exhibit F, Rec. p. 27.

Annual Meeting, Sept. 8, 1869.

"*Voted*, That this company does accept the acts and grants of the Legislatures of Connecticut, Rhode Island and Massachusetts, granting any farther and additional rights or powers in favor of this Corporation, and the Clerk shall make proper certificate and lodge with the proper officers.

"A true copy of record,

"Albert O. S. Sanford."

See Exhibit G, Record, p. 27.

The corporation having complied with the condition of the Act in a manner acceptable to the supreme authorities of Rhode Island, approved and ratified by them, and having formally accepted it, it must be deemed to have taken effect, and to have been in force as a valuable franchise, held by the complainants as assignees for the benefit of creditors. (This defendant's answer, Exhibits B, C, D, E, F, G, H, pp. 20–29, 10, 11, Record.)

Third Question.

Was the sum of $100,000 named in the bond intended by way of a fixed or stipulated penalty under the Statute, or as liquidated damages, or was it intended as a penal sum as security for any damages which the State of Rhode Island might suffer in consequence of the breach of the bond?

We submit that it was intended to be as liquidated damages, or a stipulated penalty.

I. *It was intended that the sum should be taken as liquidated damages.* It becomes important to determine the exact position of the case before we proceed to examine this question.

We shall assume for the purposes of the argument, that this Honorable Court has determined that it has jurisdiction of the cause, and that the bond was lawfully given, and is valid and binding upon these complainants, as a contract of the Boston, Hartford and Erie Railroad Company, for whatever its legal effect may be.

The position of the case is then thus:

The complainants have filed their bill against the respondents, alleging that the bond and certificate of indebtedness were given by the railroad company, and are held by the respondents.

That there has been a breach of the condition of the bond, to-wit: a total failure to perform on the part of the railroad company.

And praying that the respondents be enjoined from pursuing their remedy at law on the said bond, or from collecting the amount due on the certificate of indebtedness.

The bill contains no offer by the complainants to make specific performance of their contract, to-wit: to build the road.

But the bill does ask that the complainants may be allowed to redeem the certificate of indebtedness upon payment of any damages which the respondents may have suffered through their breach of contract, and at the same time alleges that the respondents have suffered no such damages.

In other words, the complainants seek relief in equity from a penalty or forfeiture which they say they have incurred, through their own default; they do not offer to make good the default by making specific performance of their contract, but they do offer to pay damages, and say that there are no damages.

What are the principles which govern a Court of Equity in such cases?

1. Equity will grant relief against a penalty incurred where compensation can be made; but if on a construction of the whole contract it appears that the stipulated sum was designed, not as a penalty, but as liquidated damages, a Court will not relieve against the payment.

Mr. Spence, in his valuable work on the equitable jurisdiction of the Court of Chancery, Vol. I., pp. 628–631, says: "From an early period the Court of Chancery gave relief against penalties and forfeitures in some cases.

In the reign of Philip and Mary we find bills filed to be relieved from penalties, expressly on the ground of accident, as where a person was bound to repair the banks of a river within a given time, and had been prevented by an extraordinary flood. (Cal. i., p. 142.)

Many instances of relief against penalties in money bonds, on the ground that payment had been prevented by some unforeseen event, appear in the time of Elizabeth. The jurisdiction to relieve against penalties in such cases, was well settled in the reign of James I. (Lord Coke, 4 Inst. 84, recognizes the jurisdiction of the Court of Chancery to relieve on the ground of accident. See Hovenden's note to *Crocker vs. Bevis*, 2 Freeman, 128); and the same principal was applied to the non-payment of rent.

The jurisdiction was extended to cases where the default was of a trifling nature, irrespective of accident, or apparently of any excuse, as when all the debt had been paid but £4 (the whole amount being £100), and that had been tendered. (Reg. Tib. 7 and 8, Eliz. fo. 359.)

The affording relief in these cases on other ground than accident seems to have been much objected to in the reign of James I. (Lord Ellesmere would not relieve except in cases of *extremity* or *accident;* but it appears from Mr. Norbury's complaints that this rule had been relaxed in his time, Hargr. Law Tr. 431. Sir Geo. Cary thus states the doctrine of the Court; "If a man be bound in a penalty to pay money at a day and place by obligation, and intending to pay the same, is robbed by the way, or hath entreated by word some further respite at the hands of the obligee, or cometh short of the place by any misfortune, and so failing of payment, doth nevertheless provide and tender the money in short time after; in these, and *many such like cases*, the Chancery will compel the obligee to take his principal with some reasonable consideration of his damages (*quantum expediat*); for if this was not, men would do that by covenant which they now do by bond. The like favor," he adds, "is extendable against them that will take advantage upon any strict condition for undoing the estate of another in lands upon a small or trifling default." Cary, p. i., Et vs. Cary, p. iii., ed. 1665, where one being bound to execute a release within a certain time, only asked time to be advised, and the question was brought before Lord Keeper Coventry in the following case: An estate was devised on

condition that the devisee should pay the testator's debts and legacies within a given time, and the defendant, the heir, *had entered* for the condition broken, two legacies of £5 each not having been paid.

Lord K. Coventry, *on a view of the precedents* in such cases, was clearly of the opinion to give relief against the forfeiture, and decreed that the plaintiff should hold and enjoy against the defendant and his heirs. (Underwood *vs.* Swan, Cav. 1., 1 Rep. Ch. 86.)"

In *Adams Equity* we find the followihg:

"The equity for relief against enforcement of PENALTIES, originates in the rule which formerly prevailed at law, that on breach of a contract secured by a penalty, the full penalty might be enforced without regard to damage sustained. The Court of Chancery, in treating contracts as matters for specific performance, was naturally led to the conclusion that the annexation of a penalty did not alter their character; and in accordance with this view, would not, on the one hand, permit the contracting party to evade performance by paying the penalty, and, on the other hand, would restrain proceedings to enforce the penalty on a subsequent performance of the contract itself, viz: in the case of a debt, on payment of the principal, interest and costs; or in that of any contract, on reimbursement of the actual damage sustained.

An authority of a similar kind has been now conferred on courts of law by two statutes, the first of which applies to penalties for non-performance of covenants, and the second to those of non-payment of money, (8 and 9, Will. 3, ¶ 11, § 8; 4 and 5 Ann., C. 16, §§ 12, 13; 1 Selw. N. P. 542, 588 [These or similar statutesare in force generally in the United States.].)

The effect of these statutes has been to diminish the frequency of equitable interference. But they do not affect the authority to interfere. The jurisdiction is not limited to the case of bonds or of instruments which in terms impose a penalty; but extends to all agreements where a stipulation is made in the event of non-performance, which on the whole matter appears intended as such. If it be not in truth meant as a penalty, but be merely an agreement between the parties that a fixed sum shall be paid as ascertained or liquidated damages, for doing or omitting a particular act, there is no equity to substitute a new agreement. The mere use, however, of the words "liquidated damages," will not of itself decide the question; but it depends on the substantial meaning of the contract.

If, for example, the payment of a smaller sum is secured by a larger, or if there be a series of covenants of varying importance, and the same specific sum is made payable in respect of each, the stipulated payment will be held a penal one, notwithstanding that it may be otherwise named in the contract. The distinction thus drawn between a penalty for securing the performance of the contract, and a stipulation which

makes part of the contract itself, may be illustrated by the rule, that if a certain rate of interest be reserved on a mortgage, with an agreement that if it be not paid punctually, the rate shall be increased, the larger interest is in the nature of a penalty, and may be relieved against in equity. But, on the other hand, if the larger rate be originally reserved, with an agreement for reduction on punctual payment, the condition for such punctual payment is part of the contract, and relief cannot be given if it is not fulfilled."

Adams' Equity, *284, 285, 286 and 287.

Daniells, in his Chancery Practice, says:

"The doctrine upon relief from penalties, has thus been stated by Lord Thurlow: 'Where a penalty has been inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal interest of the deed, and the penalty only is accessional, and to secure the damage really incurred." *Sloman* vs. *Walter*, 1 Bro. C. C. 418.)

But where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the non-performance of the agreement, a Court of Equity (except in certain cases of waste, which will be noticed hereafter) refuses to interfere in restraining the recovery of such damages. (On this point see 1 Swanst. 318 n.; Sainter *vs.* Ferguson, 1 M. N. and G., 286; 14 Jur., 255; Coles *vs.* Sims, 5 DeG., M. and G. 1; 18 Jur., 683, 685; Skinner *vs.* Dayton, 2 John, Ch. 535; S. C., 17 John 357; Livingston *vs.* Tompkins, 4 John Ch. 425; Walker *vs.* Wheeler, 2 Conn. 299; 2 Story Eq. Jur. Par. 1318.)"

See 2 Daniells Chanc. Pr. *1658.

In 2 Story's Equity Jurisprudence, *739, 740, 747, Par. 1313, 1314, and 1318, the learned author says:

"In the first place, as to relief in cases of penalties annexed to bonds, and other instruments, the design of which is to secure the due fulfilment of the principal obligation. The origin of equity jurisdiction in cases of this sort, is certainly obscure and not easily traced to an exact source. It is highly probable that relief was first granted upon ground of accident, or mistake, or fraud, and was limited to cases where the breach of the condition was by non-payment of money at the specified day. In such cases Courts in Equity seem to have acted upon the ground that, by compelling the obligor to pay interest during the time of his default, the obligee would be placed in the same situation as if the principal had been paid at the proper day. They wholly overlooked (as has been said) the consideration that the failure of payment at that day might be attended with mischievous consequences to the obligee which (in a rational sense) never could be cured by any subsequent payment thereof, with the addition of interest.

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If, for example, the payment of a smaller sum is secured by a larger, or if there be a series of covenants of varying importance, and the same specific sum is made payable in respect of each, the stipulated payment will be held a penal one, notwithstanding that it may be otherwise named in the contract. The distinction thus drawn between a penalty for securing the performance of the contract, and a stipulation which

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Upon this account, doubts have sometimes been expressed as to the solidity of the foundation on which the affording of relief in such cases rests."

"But, whatever may be the origin of the doctrine, it has been for a great length of time established, and is now expanded, so as to embrace a variety of cases, not only where money is to be paid, but where other things are to be done, and other objects contracted for. In short, the general principle now adopted is, that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case the true test (generally, if not universally,) by which to ascertain whether relief can, or cannot be had in Equity, is to consider whether compensation can be made or not. If it cannot be made, then Courts of Equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, Courts of Equity will relieve the party upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then Courts of Equity will retain the bill, and will direct an issue of *quantum damnificatus;* and, when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon payment of such damages."

"But we are carefully to distinguish between cases of penalties, strictly so-called, and cases of liquidated damages. The latter properly occur, when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate and conventional amount of the damages sustained by such act or omission. In cases of this sort, Courts of Equity will not interfere to grant relief; but will deem the parties entitled to fix their own measure of damages; provided, always, that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature or extent of the injury. But, on the other hand, Courts of Equity will not suffer their jurisdiction to be evaded merely by the fact that the parties have called a sum damages, which is, in fact and intent, a penalty; or because they have designedly used language and inserted provisions, which are in their nature penal, and yet have endeavored to cover up their objects under other disguises. The principal difficulty in cases of this sort is to ascertain when the sum stated is in fact designed to be *nomine pœnæ*, and when it is properly designed as liquidated damages."

Catherine Lowe vs. *Newsham Peers*, 4 Burrow's Rep. 2225–2228.

This was an action of covenant, upon a marriage contract, being a promise under the defendant's hand and seal and in his own handwriting, to the effect following: "I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself. If I do I agree

to pay to the said Catherine Lowe £1000 within three months next after I shall marry anybody else.

Witness my hand and seal.

NEWSHAM PEERS. [SEAL.]"

This deed was executed in 1757, and in 1767, *Peers* married another woman, whereupon this action was brought.

Per Lord Mansfield, C. J.:

"And upon *this distinction* they proceed in Courts of Equity.

They will *relieve against a penalty*, upon a *compensation;* but when the covenant is "to pay a particular *liquidated* sum," a Court of Equity can*not* make a *new* covenant for a man; nor is there any *room* for *compensation* or *relief*. As in leases containing a *covenant against plowing up a meadow;* if the covenant be "not to plow" and there be a *penalty*, a Court of Equity will *relieve against the penalty*, or even go further than that (to preserve the *substance* of the agreement,) but if it is worded—"to pay £5 *an acre for every acre plowed up*," there is no *alternative*, no room for any relief against it, *no compensation;* it is the *substance* of the agreement. Here the specified sum of £1000 is found in damages. It is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the *proper quantum* of the damages."

We find the following note by the learned Reporter in 1 Swanston, p. 318:

"Where penalties are inserted in a case of non-performance this has never been held to release the parties from their agreement, but they must perform it, notwithstanding."

Per Lord Hardwicke:

Howard vs. *Hopkins*, 2 Atk. 371.
Chilliner vs. *Chilliner*, 2 Vesey, 528.
Hobson vs. *Trevor*, 2 P. Wms. 191; 10 Mod. 517; Str. 533.
Holtham vs. *Ryland*, Nels. 205; Avon Mos. 37.

The rule being that the penalty is not to be considered as of the essence of the contract.

Magrave vs. *Archibald*, 1 Dowe, 107.

But if on a construction of the whole contract it appears that the stipulated sum was designed not as a penalty, but as liquidated damages, a Court of Equity will not relieve against the payment.

Roy vs. *Duke of Beaufort*, 2 Atk. 194.
East India Co. vs. *Blake*, Finch, 117.
Small vs. *Lord Fitz Williams*, Proc. in Chancery, 102.
Ponsonby vs. *Adams*, 2 Bro. P. C. edit. Fowl. 431.
Rolfe vs. *Peterson*, Ibid. 436.
Lowe vs. *Peers*, 4 Burr. 2228, 2229.
Astley vs. *Weldon*, 2 Bos. & P. 346.
Street vs. *Rigby*, 6 Ves. 818.

Nor enforce the performance of the agreement for the breach of which the parties have provided this specific remedy.

Woodward vs. *Gyles*, 2 Vernon, 119.
Street vs. *Rigby*, 6 Ves. 818.
1 Fonblanque, Treatise of Equity, 151, 152 u.

On the principle that that provision is an essential term of the contract."

See 1 Swanston, p. 318, note.

Skinner vs. *Dayton*, 2 Johns. Chancery, 536.

Chancellor Kent: "There is no branch of the jurisdiction of this Court, says Lord Eldon in *Sanders* vs. *Pope*, more delicate than that which goes to restrain the exercise of a legal right. That jurisdiction rests only upon this principle that one party is taking advantage of a forfeiture. But the present case is not one in which the forfeiture is exacted. The instalments are more in the nature of stipulated damages and it is settled that Equity will not relieve against them."

Woodward vs. *Gyles*, 2 Vern. 119.

Rolf vs. *Peterson*, 6 Bro. P. C. 470.

2. In determining whether the sum named is a penalty or is liquidated damages, the intention of the parties is always held to govern.

Per Sir John T. Coleridge in delivering the judgment of the Privy Council in *Dimech* vs. *Corlett*, 12 Moore's P. C. R. 229: "The law of this country on the question of penalty or liquidated damages may now be considered, after a great number of decisions, not, perhaps, all of them strictly reconcilable with each other, to be, however, at length satisfactorily settled, and the hinge on which the decision in every particular case turns is the intention of the parties, to be collected from the language they have used. The mere use of the term 'penalty,' or the term 'liquidated damages,' does not determine that intention, but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument."

And see *Lea* vs. *Whitaker*, Law Rep. 8 C. P. 70, and *Dakin* vs. *Williams*, 17 Wend. 447, where Nelson, C. J. said the business of the Court is to inquire after the meaning and intent of the parties; and where that is clearly ascertained from the terms and language used, it must be carried into effect.

3. It is a well settled rule of law that where the damages are uncertain and difficult of estimation, and must necessarily be problematical from the nature of the case, then the sum agreed upon between the parties will be held to be liquidated damages.

And the reason for this is, that where the damages cannot be determined, *compensation cannot be made*, and where compensation cannot be made Equity cannot interfere.

See cases cited above.

We quote from Mayne on Damages:

"The question, whether a sum mentioned in an agreement, to be paid for a breach is to be treated as a penalty, or as liquidated and ascertained damages, is a question to be decided by the judge, upon a consideration of the whole instrument. (*Sainter* vs. *Ferguson*, 7 C. B. 727.)

The following appear to be the principles by which their decision is governed:

Where the sum is expressly stated to be a penalty, and there are no other words altering, controlling or affecting this statement, the sum cannot be considered as liquidated damages. (*Smith* vs. *Dickenson*, 3 B. & P. 630; *Sloman* vs. *Walter*, 1 Bro. C. C. 418.)"

"Where the payment of a smaller sum is secured by a larger, the sum agreed for must always be considered as a penalty. (*Per* Chambre, J., *Astley* vs. *Weldon*, 2 B. & P. 354.)"

"It has been laid down broadly, 'that where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered a penalty.' (*Per* Heath, J., 2 B. & P. 353.)"

"On the other hand, if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty. (*Per* Parke, B., *Atkyns* vs. *Kinner*, 4 Exch. 776, 783, [so where a specified increased rent was to become payable on breach of any of the covenants in the lease; *Smith* vs. *Ryan*, 9 Ir. L. R. 235.]) And so it was held where a covenant for dissolution of partnership between attorneys contained an agreement, 'that the said J. S. will not within the next seven years carry on the business of an attorney within fifty miles from E., nor interfere with, solicit, or in-

fluence the clients of the late copartnership, and if the said J. S. shall in any respect infringe the present covenant, he the said J. S. shall pay the sum of £1000 as liquidated damages, and not by way of penalty.' (*Goldsworthy* vs. *Strutt*, 1 Exch. 659; *Rawlinson* vs. *Clark*, 14 M. & W. 187. [So *Reynolds* vs. *Bridge*, 6 E. & B. 528; 26 L. J. Q. B. 12.])"

"There never was any doubt that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty. (*Per* Cresswell, J., *Sainter* vs. *Ferguson*, 7 C. B. 730; *Fletcher* vs. *Dyche*, 2 L. R. 32. [*Sparrow* vs. *Paris*, 7 H. & N. 594; 31 L. J. Ex. 137.]) And this, even though the contract be one of indemnity, as an insurance policy, and it can be proved that the plaintiff has not been damnified to the amount estimated. (*Gonig* vs. *Manning*, 6 C. B. 391.)"

Mayne on Damages, 2d ed. by Lumley Smith.
See also Sedgwick on Damages.
Field on Damages.

The cases which might properly be cited as authorities to show that the damages in this case should be held to be liquidated damages, are so numerous that it is difficult to make a selection.

We cite the following among the English cases:—

Ponsonby v. *Adams*, 6 Bro. Parl. Cas. 418.
Rolfe v. *Peterson*, 6 Bro. Parl. Cas. 470.
Lowe v. *Peers*, 4 Burr, 2229.
Barton v. *Glover*, 1 Holt's N. P. 43 and note.
Astley v. *Weldon*, 2 Bos. & Pul. 346.
Reilly v. *Jones*, 1 Bing. 302.
Crisdee v. *Bolton*, 3 C. & P. 240.
Fletcher v. *Dycke*, 2 Term, 32.
Peacher v. *Somerset*, 1 Strange, 447.
Croft v. *Goldsmid*, 24 Beav. 312.
Bonsall v. *Byrne*, Irish R. 1 C. L. 573.
Wood v. *Wade*, 2 Stark N. P. 167.
Lea v. *Whitaker*, Law Rep. 8, C. P. 70.

Out of the above cases we give a summary of the following:—

In *Ponsonby* v. *Adams*, 6 Bro. Parl. Cas. 418, where it was covenanted that if the tenant failed to reside on an estate in Ireland, leased to him, his rent should rise from £125 to £150, it was decreed that the £25 additional rent was to be considered as liquidated damages.

In *Rolfe* v. *Peterson*, 6 Bro. Parl. Cas. 470, the same rule was laid down, respecting a covenant that the tenant should pay £5 per annum for every acre broken up and converted into tillage.

In *Lowe* v. *Peers*, 4 Burr, 2229, the same doctrine was held respecting a promise to pay £1,000, if the defendant married any woman except the plaintiff.

In *Fletcher* v. *Dyckes*, 2 Term, 32, the plaintiff having agreed to do certain works, and if he did not do them within a certain time to "forfeit and pay the defendant the sum of £10 for every week after the time agreed upon," the Court allowed the £10 per week to be set off by the defendant as liquidated damages in an action brought against him by the plaintiff.

In *Croft* v. *Goldsmid*, 24 Beav. 312, a builder agreed to take some land on a building lease and to erect houses within a specified time, the landholder making certain advances. There was a clause of forfeiture, in default of their being completed within the time. Relief against a forfeiture was refused to the builder, it appearing that the landowner had fully performed his part of the contract.

In *Bonsall* v. *Byrne*, Irish Reports, 1 C. L. 573, A entered into a bond conditioned for taking down a certain building, etc., before a day fixed, under a penalty of £10 pounds for every week after the day fixed during which the work was uncompleted. Held, that the sum of £10 per week was liquidated damages, on the ground of the incapability of accurately measuring the damages.

And out of the numerous American cases we cite the following:—

White v. *Dingley*, 4 Mass. 433.
Pierce v. *Fuller*, 8 Mass. 223.
Hodges v. *King*, 7 Metc. 583.
Chase v. *Allen*, 13 Gray, 42.
Lynde v. *Thompson*, 2 Allen, 456.
Hall v. *Crowley*, 5 Allen, 304.
Mead v. *Wheeler*, 13 N. H. 351.
Tingley v. *Cutler*, 7 Conn. 291.
Dakin v. *Williams*, 17 Wend. 447.
Harris v. *Hardy*, 3 Hill, 393.
Slosson v. *Beadle*, 7 Johns. 72.
Phelon v. *Albany & Susquehanna R. R.*, 1 Lansing, 258.
Cotheal v. *Talmadge*, 1 E. D. Smith 576.
Bagley v. *Peddie*, 16 N. Y. 469.
Mott v. *Mott*, 11 Barb. 127.
Esmond v. *Van Benschoten*, 12 Barb. 366.
Homes v. *Homer*, 12 Barb. 137.
Munday v. *Culver*, 18 Barb. 336.
Brinkerhoff v. *Olp, Ex'r*, 35 Barb. 27.
Faulce v. *Burke et al.*, 10 Pa. St. 469.
Powell v. *Burroughs*, 54 Pa. St. 329.
Lange v. *Werk*, 2 Ohio St. 520.
Hamilton v. *Overton et al.*, 6 Blackf. 206.

Huff v. *Lawlor*, 45 Ind. 80.
Pierce v. *Jung*, 10 Wisc. 30.
Ryan v. *Martin*, 16 Wisc. 57.
Morse v. *Rathburn*, 42 Mo. 594.
California Nav. Co. v. *Wright*, 6 Cal. 258.
Fisk v. *Fowler et al.*, 10 Cal. 512.
People v. *Love et al.*, 19 Cal. 676.
Watts Ex'ors v. *Sheppard*, 2 Ala. 425.

Out of the above cases we give a summary of the following: —

In *Pierce* v. *Fuller*, 8 Mass. 223, it was agreed that a penalty of $200 be forfeited if a stage run between Boston and Providence. The damages were held to be liquidated damages.

In *Mott* v. *Mott*, 11 Barb. 127, an agreement was made by which one of the parties bound himself not to practise medicine within a certain limit for a certain length of time, in the sum of $500, liquidated damages. *Held* to be liquidated damages.

In *Slosson* v. *Beadle*, 7 Johns. 72, A, in consideration of $500, covenanted to convey certain land within a stated period of time, or forfeit $800. Held to be liquidated damages.

In *Hall* v. *Crawley*, 5 Allen, 304, it was held that a clause in an agreement to repair certain houses and have them completed by a certain date, which provided that "for each and every day's delay in the completion of said houses after December 1st said Hall is to forfeit $5.00," was to be construed as fixing the amount of liquidated damages and not as a penalty. The decision was based on the intent of the parties as shown by the language of the agreement.

In *Munday* v. *Culver*, 18 Barb. 336, where, in an agreement for the sale of goods and the good-will of a shop, it was agreed that if either party should fail to fulfil the agreement, he should pay to the other party $1,000 as liquidated damages, it was held, on a breach of the agreement that the plaintiff could recover the $1,000 as liquidated damages, on the ground of the uncertain nature of the damages and the direct stipulation of the parties.

In *Fisk* v. *Fowler*, 10 Cal. 512, where plaintiff purchased of the defendant a coasting vessel, and paid a portion of the purchase money, and defendant could not give a perfect title, but gave a bond in the penal sum of $2,000, to give a good and perfect title within a certain time, and failing to do so the plaintiff brought suit on the bond, it was held that the sum mentioned in the bond should be considered as liquidated damages, on the ground of the difficulty, if not impossibility, of estimating the amount of damages suffered by reason of the defendant's failure.

In *Chase* v. *Allen*, 13 Gray, 42, the owners and occupants of real estate in the city of Worcester subscribed a sum of money, and others

gave their notes to A to aid him in building a hotel in said city. A gave a bond to plaintiff, conditioned in case of failure to build the hotel to pay the plaintiff on demand for the benefit of the subscribers the money subscribed, to discharge those who had given their notes from all liability thereon, and to further pay to plaintiff, "for the benefit of all the subscribers, in proportion to the amount of their subscriptions, the additional sum of $20,000, not as a penalty, but as fixed and liquidated damages, and subject to no deduction." The Court said, "The determination of this question, whether a sum named in a contract to be paid for a breach is to be regarded as a penalty or as liquidated damages, depends not so much on the form or language of the contract as upon its subject matter and the nature of the covenants and agreements. . . . The subject matter of the contract (in the case at bar) is such as to render it quite impossible to form any estimate of the damages occasioned by a breach of its stipulations. No standard by which the damages can be measured is furnished by the contract itself, nor would extrinisic evidence afford any means by which they could be accurately or even approximately ascertained. The persons who subscribed to the fund to aid the defendant in erecting a hotel were prompted to do so by the expected benefit which would thereby accrue to them respectively by enhancing the value of their real estate and by increasing the business in that part of the city of Worcester. It is obvious that the damages which each would sustain by the loss of this anticipated benefit are peculiarly uncertain and difficult of estimation in money. This is therefore, one of those cases where it must be presumed that the parties stipulated for payment of a fixed sum of money absolutely, from the difficulty of ascertaining any exact amount of damages which would be sustained by a breach of the agreement."

The subject is discussed and the same rules laid down for determining what are liquidated damages in White and Tudor's Leading Cases in Equity, in the notes to *Peachy* v. *Somerset*, and *Sloman* v. *Walter*. (See particularly in fourth American edition, p. 2042, *1117, and pp. 2052, 2053, 2059, 2063.)

It will be observed that in this case neither the bond itself, nor the statute calling for the bond, contain either the words "penal sum" or "liquidated damages."

See Record, p. 25.

4. The fact that this is a bond upon a condition can make no difference. There is nothing sacred about a bond. It is the duty of the Court to examine it, as it would any other contract and to determine what was the intention of the parties, as to whether the sum named is to be regarded as liquidated damages or as a penal sum.

See in addition to the authorities above cited, the following cases of bonds where the courts have examined this question.

Miller v. *Elliott*, 1 Ind. 484.
Smith v. *Smith*, 4 Wend. 468.
Fisk v. *Fowler*, 10 Cal. 512.
Fletcher v. *Dyke*, 2 T. R. 32.
Mercer v. *Irving*, E. B. & E. 563.
Chase v. *Allen*, 13 Gray 42.
Cotheal v. *Talmage*, 9 N. Y. 551.
Hodges v. *King*, 7 Metc. 583.
Roy v. *Beaufort*, 2 Atk. 190, 193, 194.

Edward Leary v. *Arthur W. Laflin* and others, 101 Mass. Reports, pp. 334, 335 and 336.

"Contract on a bond of Laflin, with two sureties for the payment of $1000.00 to the plaintiff, on the following condition:

'Whereas the said Leary has this day leased to the said Laflin a certain stable building and land on Northampton street in said Boston, reference being had to said lease of same date with these presents: Now, if the said Laflin, or his assigns or sub-tenants, for and during the term of said lease shall carry on the boarding and livery business at said demised premises, in the same manner, and extent, and in as good, safe, careful and faithful a manner, satisfactory to all reasonable parties as the said Leary has there carried on said business for the last five years, and, at the termination of said lease by time or otherwise, surrender to said Leary or his representatives, the said demised premises and good will, in as good repute and run of custom as now thereto pertain, all the above so far as may depend on said Laflin's best exertions and care, then this obligation shall be null and void, otherwise to remain in full force and virtue, and to be paid as liquidated damages.'

Colt, J. It is the duty of courts to enforce the lawful contracts of competent parties, fairly made upon good consideration; and when in such contracts the parties have agreed to liquidate the damages resulting from a breach, the jury are bound to find the amount agreed.

Whether in any particular instance the sum named is to be regarded as a penalty, or as liquidated damages, will depend upon the intent of the parties, as gathered from the terms of the whole contract, applied to the subject matter. The mere use of the words "liquidated damages" is not decisive. In applying the rules of interpretation, forfeitures are not favored, and if possible the sum named is treated as a penalty, because then the defendant is permitted to show the actual damages. The rules of construction which govern in these cases are fully and well stated in *Lynde* vs. *Thompson*, 2 Allen, 456, and need not be here repeated.

The condition of the bond was substantially for the performance of one thing, namely, the carrying on of the livery business, during the term of the lease, faithfully and as it had been before conducted by the lessor, so as not to impair its good repute and run of custom. From the nature of the case, the actual damages resulting from a breach of this agreement are not capable of being ascertained by any satisfactory and known rule, and it was manifestly the intention, as it was clearly within the power, of the parties, not to leave them to the uncertain estimate of the jury but to fix them by express agreement.

In the opinion of the court, there was error in holding the sum here named to be in the nature of a penalty, instead of liquidated damages. *Cushing* vs. *Drew*, 97 Mass. 445; *Fisk* vs. *Gray*, 11 Allen, 445; *Green* vs. *Price*, 13 M. & W., 695, S. C. 16 M. & W. 346. Other questions raised by the exceptions were waived at the hearing. Exceptions sustained.

John Gowen vs. *Ansel Gerrish*, 15 Maine Rep., pp. 273–'74–'75.

Debt upon a sealed instrument of which the following is a copy:

"Know all men by these presents, that whereas *John Gowen* of Shapleigh has given me a bond to convey certain real estate of the amount of $6000.00, a long day of payment given, and no mortgage conveyance for security, that I *Ansel Gerrish* of Shapleigh, do bind myself and am firmly held unto said *Gowen* in the full just sum of seven thousand dollars well and truly to be paid unto the said *Gowen*, dated and sealed with my seal on the 27th day of May, 1835. The condition of this obligation is such, that if the said Gerrish does not become surety to any person in any sum of money, or any kind of obligatory writing except for said Gowen, until said $6000.00 and interest are fully paid, then his obligation shall be void, otherwise on the first liability of the least magnitude, this obligation to be in full force for the sum of $7000.00, forthwith by suit against me." The bond was in the handwriting of one of the parties. On the trial it was shown that on the same 27th of May, 1835, the land was conveyed by the plaintiff to the defendant, that the notes given for the consideration money were unpaid; and that before the commencement of this suit, the defendant had become surety for others than the plaintiff. At the trial, and at the argument of the case, the notes were offered to be delivered up to the defendant. The counsel for the plaintiff contended that they were entitled to receive the sum of $7000.00 as damages liquidated by the parties in the bond. The Chief Justice of the Common Pleas instructed the jury that this was to be considered a bond with a penalty, and subject to chancery, and that the plaintiff was entitled to recover only the damages actually sustained, which in this case were merely nominal.

The verdict for the plaintiff was for but one dollar, and he filed exceptions.

Weston, C. J.—The language of the instrument, upon which this action is brought, is peculiar; but we think it is not difficult to understand what the parties intended. The defendant had obtained from the plaintiff a long credit, upon a contract for the purchase of real estate. His ability to pay might be greatly impaired, by his becoming surety for others. To relieve the plaintiff from the hazard thence arising, the defendant obliga[illegible] himself, that if he did become surety for any one, while the purchase money remained unpaid, the term of credit given to him should cease and the plaintiff might enforce immediate payment, by means of the bond.

This it appears to us, is what the parties must have designed. The sum secured by the bond, exceeded by one-sixth part the price agreed to be given for the estate; but this must have been intended to secure the accruing interest. Upon this view of the case, the parties have afforded a measure of damages susceptible of exact calculation, from which neither the court nor the jury are at liberty to depart. The bond then enforced, is a substitute for the other security, given upon the extended credit, and is to be limited to the original price with the interest which may have accrued. The obligation of the other security will no longer remain in force; and it should be given up to be cancelled.

If the subsequent renewal of a liability, existing at the date of the bond, might not be a breach of its condition, the amount for which the defendant became surety, in January, 1836, was for a greater sum, than that which he had before assumed, by which the defendant became liable in an action on the bond, by its express terms.

The lawful intention of the parties, in a case free from fraud where it can be ascertained, must have a decisive influence in determining whether the sum stated is to be regarded as a penalty, or as stipulated damages.

We had occasion to consider the cases upon this question in *Gammon* vs. *Howe*, 14 Maine Rep. 250.

In our opinion the jury were not properly instructed by the presiding Judge, as to the rule of damages. The exceptions are accordingly sustained, the verdict set aside, and a new trial granted.

Bagley vs. *Peddie*, 16 New York, 469. Action on a bond.

Shankland, J.—The principal question to be settled in this case is, whether the parties have so contracted as to have fixed the amount of damages to be recovered of the defendants, in case of non-performance by Charles B. Peddie. Although the courts have uniformly conceded to parties the right to fix the amount of damages in advance, of the breach of the contract, and at any sum, however disproportionate to the real damages, they shall see fit, and have likewise conceded that it is a question of intention, to be derived from the scope and tenor of the agreement, yet, when the judicial mind has acted upon this class of

cases, it is evident how repugnant it has been to enforce them according to the plainly expressed language of the contracting parties. Hence have sprung up a series of artificial rules peculiar to contracts of this character, which, while they ostensibly profess to comply with the fundamental canons of construction appertaining to the legal science, contrive to contravene them by artificial distinctions and limitations. I will repeat some of the rules found in books:

First. The language of the agreement is not conclusive, and the efforts of the court is to learn the intent of the parties. Hence the term "liquidated damages" is not sufficient to control the construction, if the court can discover in other parts of the instrument reason even to doubt as to the intention of the parties. Second. Where the word penalty is used it is generally conclusive against its being held liquidated damages, however strong the language of other parts of the instrument in favor of such construction. Third. If the sum stipulated is to be paid on the non-payment of a less sum which is certain in amount (or, as some judges say, can be easily ascertained by a jury), and made payable by the same instrument, then it will be treated as a penalty. Fourth. When the agreement is in the alternative to do an act or pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money. Fifth. If the sum be evidently fixed to evade the usury laws, or any other statutory laws, or to cloak oppression, the court will relieve by treating it as a penalty. Sixth. If independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture in such case the damages will be considered liquidated if they are so denominated in the instrument. Seventh. If the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of sane act agreed to be done, then the court will enforce the contract, if legal in other respects.

5. The various statutes of Massachusetts and Rhode Island and of the United States can have no bearing upon this case.

The object of this legislation was to place courts of law upon the same footing with courts of equity with reference to penalties. At common law, the Courts of Law, in actions upon obligations after breach, were obliged to give judgment and execution after breach for the whole penalty; and relief could only be had in Equity.

The U. S. Revised Statutes, §961, embody the net result of the legislation on this subject.

The section is as follows:—

"In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default, or confession of the

defendant, or upon demurrer, the Court shall render judgment for the plaintiff to recover so much as is due according to Equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."

"Judgment shall be given to recover so much *as is due according to Equity.*"

According to Equity, as we have conclusively shown above, if the damages are liquidated the whole sum is due.

The statutes do not change the powers of a Court of Equity in the premises.

To sum up our conclusions:—

We contend that the damages are liquidated here, and that Equity will not interfere with our legal rights in the premises:

1. Because no compensation can be made.

2. Because the bond is conditioned upon the performance of a single act, to wit: upon the building of the road within the time limited, and when the agreement is in the alternative to do some particular thing, or pay a given sum of money, the Court will hold the party failing to have had his election, and compel him to pay the money.

3. Because the damages from the breach of the condition are necessarily incapable of legal estimation and proof.

Whether the road were not built at all, or whether it were partly built and then abandoned, no legal damage to the State of Rhode Island, as a State, could be shown.

The bond could in no event be of the slightest value, as no damage could ever be shown.

4. Because it is evident that the intention of the parties was that this sum should be payable as liquidated damages.

This is evident from the circumstances of the case, otherwise the bond must be a perfect nullity.

It is also evident from the contract of the parties:

The complainants assignor, the Boston, Hartford and Erie Railroad, understood and intended that the sum named in the bond should be treated and regarded as liquidated damages to be forfeited to the State upon breach of the condition of the bond; because, instead of furnishing sureties on the bond, they elected to deposit with the General Treasurer

of the State of Rhode Island, that which was equivalent to cash, viz: a five months' obligation of the city of Boston, which could have been converted immediately into cash in the market by the General Treasurer, or collected at maturity, Dec. 1, 1869, long before the breach of the bond could occur, to wit: Jan. 1st, 1872. Of course, if the State of Rhode Island had so collected the money of the City of Boston at the maturity of the obligation, and it had passed into their general treasury, there would be no power anywhere to compel the State of Rhode Island to surrender the money, there having been a breach of the bond. It is not to be supposed that the Boston, Hartford and Erie Railroad, when they thus voluntarily put the State of Rhode Island in this position, could have had any other understanding or intention than that the sum named in the bond was to be treated as liquidated damages, to be forfeited to the State in case of a breach of the bond.

II. *It was intended by the Legislature of Rhode Island as a fixed, stipulated penalty for the violation of a duty imposed by Statute.*

This bond was required by a statute of the State of Rhode Island. The sum named must be regarded as a penalty imposed by the statute for the violation of the duty imposed upon the railroad company by the statute.

All the circumstances of the case, and also the testimony in the case, show conclusively that such must have been the intention of the Legislature.

The testimony shows that the granting of the charter was opposed before the Legislature on the ground that the Boston, Hartford and Erie Railroad Company had no means wherewith to build the road; that they had no intention in fact to build the road; that their sole and real object in applying for the charter was to blackmail and injure other corporations and citizens of Rhode Island.

See Deposition of Abraham Payne, Record, p. 37.

If this was true, the Boston, Hartford and Erie Railroad Company was unquestionably guilty of bad faith towards the Legislature and State of Rhode Island, and in some sense guilty of crime, because they were seeking the assistance of the State under false pretenses, to assist in wronging and defrauding others.

All must agree that it is the part of sound public policy to discourage such attempts, and to punish them when discovered.

The Legislature granted the petition of the Boston, Hartford and Erie Railroad Company; but it affixed a penalty for the violation, by the company, of its undertaking.

It did not decide whether the railroad company was guilty of bad faith as charged, or not. But it did say to the railroad company: We

will grant you the charter you ask for, but you must come under a penalty or forfeiture if you prove by your conduct that you are guilty of fraud in this matter, as is charged against you here.

It is important to recollect in this connection, that the act first gives the railroad company sixty days from the rising of the General Assembly in which to determine whether they would accept the act with the penalty annexed or not; and then fixes a time further, to wit: nearly three years, within which they are to build their road.

See Record, p. 25.

The railroad company need not have accepted it; but if they did accept it, they did so subject to a penalty which the law imposed upon them if they did not perform the duty which was also imposed by the same law.

We submit that the case is not to be governed by the ordinary rules respecting damages under contracts between private parties, but that the sum of $100,000 is a penalty or forfeiture inflicted by the sovereign power for a breach of its laws.

The case falls within the principle of the decisions in

United States v. *Hatch*, 1 Paine, 336.
United States v. *Montell*, Taney, C. C. 47.
Benson v. *Gibson*, 3 Atk. 395.
Treasurer v. *Patten*, 1 Root, 260.

United States vs. *Francis T. Montell*, Taney's Circuit Court Rep. No. 48, 49, 50, 51.

Taney, J. C.—"The case now before the Court arises upon the foregoing sections of these two acts of Congress. Francis T. Montell, the owner, became bound with John B. Corner, the master, and James E. Montell, their surety, for the return of the register of the Elvira, in the sum of $1200. The register was not returned according to law, whereupon suit was brought on the bond, and a judgment recovered against the two Montell's, in the District Court, and the money paid into the court, where it still remains under the agreement filed. The collector thereupon filed his petition in the District Court, praying that a moiety of the sum recovered should be paid to him and the two other officers before mentioned; and the question presented by his petition is this: Is the sum recovered upon the bond of Montell, a penalty or forfeiture recovered for an offence against the act of Congress?

If it is, then the officers are entitled to the moiety they claim. The District Court was of the opinion that the sum recovered was not a penalty or forfeiture for an offence against the act of Congress, and therefore dismissed the petition, and from this decision the collector has appealed to this court.

The question is one of some difficulty. Penalties and forfeitures imposed by statute are not usually provided for by bond and security given in advance.

The sum recovered from Montell, is recovered upon a contract; and was not and could not have been brought in any of those forms which are usually necessary for the recovery of fines or forfeitures imposed by law. Yet the sum was, in truth, forfeited by Montell, by reason of his violation of a duty imposed by an act of Congress; it was a specific penalty upon the owner and master, for the commission of a particular offence against the policy of that law. And although the amount was secured by a bond given for the performance of the duty, yet this duty was a part of the same policy with other duties mentioned in the act, and for which other penalties are inflicted; a moiety of which last mentioned penalties go, it is admitted, to the collector, naval officer, and surveyor.

It is certainly not to be regarded as a bond with a collateral condition, in which the jury are to assess the damages which the United States shall prove that they have sustained; for, according to that construction, the amount of damages would not depend upon the amount of the penalty described in the section, which is graduated according to the size of the vessel, but would depend upon the discretion of different juries, and larger damages might be given where the penalty was only $400, than in a case where the penalty was $2000.

This obviously, is not the intention of the law; and the United States are entitled to recover the whole sum, for which the party is bound, if any one of the conditions are broken. Besides, how could the United States prove any particular amount of damages to have been sustained by them in a suit on this bond? What do they lose? It would be difficult we think by any course of proof or any process of reasoning, to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury, or be liquidated by agreement between the parties.

The sum, for which the parties are to become bound, is manifestly a penalty or forfeiture, inflicted by the sovereign power for a breach of its laws.

It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offence. And it is not the less a penalty and a punishment, because security is taken before the offence is committed, in order to secure the payment of the fine if the law should be violated."

Fourth Question.

Whether the State of Rhode Island has proved any legal damage in consequence of the breach of the bond, and if so, how much?

Upon this point we respectfully submit that if it is a possible thing to prove such damage in a case of this nature, the State of Rhode Island has proved it, and to an amount exceeding the sum of $100,000.

The General Assembly of Rhode Island, during the years 1864 to 1869, inclusive, sat at an expense of about $200 per day. (Deposition of Samuel Clark, p. 36, Record.)

The Assembly was engaged for a long period of time during those years in considering whether a charter should be granted to build this road. (Deposition of Abraham Payne, p. 36; deposition of B. N. Lapham, p. 37, Record.)

Thereby the State has been put to a large expense, which would not have been incurred had not the application for leave to build this road been made, and the road not having been built, the State reaped no corresponding benefit.

Had the road been constructed, its length in Rhode Island would have been about seven miles. (Deposition of John W. Ellis, p. 35, Record.)

It would have cost about $30,000 a mile to build (deposition of Jesse Boynton, p. 35), and this money would have been expended mainly for the benefit of citizens of the State of Rhode Island. It would have added more than $700,000 to the taxable property of the State, and yielded in annual taxes some $9,000 or more. (Deposition of John R. Balch, pp. 33 *et seq.*, Record.)

Moreover, the indirect advantages which the State would derive from the construction of such a railroad, in the consequent increase of travel, of business and of its material prosperity, would be such that the sum of $100,000 is very far from an adequate compensation therefor.

Nor can it be pretended that the State of Rhode Island is prevented from proving damage by reason of the admission in the agreed statement of facts made by the Respondent Clark that there is not any evidence of any damage accruing to the State of Rhode Island or any citizen thereof under said act.

Record, p. 14.

The interlocutory order entered by Judge Shepley (Record, pp. 29, 30), especially directed that the State of Rhode Island have leave to enter an appearance in the cause and offer testimony as to the damage.

It was under this order that the testimony was taken.

We respectfully submit that upon the whole record the decree of the Circuit Court should be reversed.

CHARLES HART,

WILLIAM G. ROELKER,

Of Counsel for the Appellants.

Ms-301

Supreme Court of the United States

OCTOBER TERM, 1862.

No. [illegible].

SAMUEL CLARK ET AL.

vs.

GEORGE M. BARNARD ET AL.

[illegible]

BRIEF FOR THE APPELLEE.

[illegible]

[illegible]

Supreme Court of the United States.

No. 266.

SAMUEL CLARK AND THE STATE OF RHODE ISLAND, *Appellants*,

vs.

GEORGE M. BARNARD AND OTHERS, ASSIGNEES IN BANKRUPTCY OF THE BOSTON, HARTFORD & ERIE RAILROAD COMPANY, *Appellees*.

Brief for the Assignees in Bankruptcy of the Boston, Hartford & Erie Railroad Company, Appellees.

STATEMENT OF THE CASE.

The facts and the proceedings in this case are briefly as follows: —

In 1869, the State of Rhode Island passed an Act authorizing the Boston, Hartford & Erie Railroad Company, a Connecticut corporation, to build a certain addition to its railroad (Record, pp. 31–38). The Act was not to go into effect, unless the Company should, within a time specified, deposit with the Treasurer of the State a bond with sureties satisfactory to the Governor for $100,000, conditioned to complete said addition before 1872. § 12. (Record, p. 38.)

The Company did, in fact, profess to accept this Act; but the appellees contend, on facts which will be stated in connection with the argument of this question, that such acceptance was *ultra vires* of the Company.

No bond with sureties such as the Act calls for was ever filed. But, on June 24, 1869, the directors of the Company took $100,000 of its funds, lent it to the City of Boston, and took from the City its negotiable promissory note, or certificate of indebtedness, payable

to the Treasurer of Rhode Island or order, for $100,000 (Record, p. 41), and delivered it to Samuel Parker, who was then the Treasurer, together with a bond of the Company to the State for $100,000, conditioned to complete the said addition before 1872 (Record, pp. 38, 39).

In 1870, the Company was adjudged a bankrupt, and these appellees were appointed assignees. The addition has never been built.

In 1872, these assignees filed a bill against Samuel Clark, who was then the Treasurer of the State of Rhode Island, and the City of Boston, praying that Clark might be decreed to deliver the note to the assignees, and might be enjoined from collecting it from the City, and that the City might be decreed to pay the $100,000 to the assignees.

The bill was taken for confessed against the City (Record, p. 13). Clark demurred to the bill, solely on the ground that it was in truth a suit against the State of Rhode Island, to which the judicial power of the Court did not extend.

Judge Shepley, the Circuit Judge, overruled the demurrer (Record, p. 13). The defendant Clark then answered; and the case was heard before Judge Shepley, on agreed statement of facts (Record, p. 21). It was agreed in this statement (Record, p. 23) that there was not "any evidence of any damage accruing to the State of Rhode Island or any citizen thereof under said Act, or anything done or omitted to be done thereunder."

Judge Shepley, without showing it to counsel, made an interlocutory decree (Record, p. 47), by which he ordered the City to pay into the registry of the court the sum due on the promissory note, for which the receipt of the registrar should be a discharge to the City against all persons; and that the Treasurer of the State of Rhode Island should have sixty days to take and file "any evidence in relation to any claims for damages by reason of any breach of the bond," or any other claim upon the note. He found that the note had been delivered by the Company and accepted by the State in lieu of any surety on the bond, and ordered that the Treasurer, upon filing the note in court, be allowed to receive from the registry such portion, or the whole, of the sum deposited by the City, as should amount to the sum for which any surety, and for which the principal obligor on the bond, would be liable, upon the evidence, either for any penalty or damages by reason of the non-

performance and breach of the conditions of said bond, and any sum which the Treasurer is entitled to recover upon the note, and hold against the Company and its assigns.

Some little evidence was taken by Clark and by the plaintiffs, and is to be found Record, pp. 57–72.

Judge Shepley having died, the case came on for final hearing before Judge Lowell. The State of Rhode Island appeared, and, without prejudice to the demurrer of Clark, claimed the fund in the registry (Record, p. 51). The court allowed this claim to be filed as of the date of Judge Shepley's interlocutory decree.

After argument, Judge Lowell held that the penalty on the bond was a penalty and not liquidated damages, and that no damages had been shown (Record, p. 73); and he decreed that the entire sum in the registry, less the costs of Clark, should be paid to the assignees of the Company (Record, p. 52). From this decree, Clark and the State of Rhode Island appealed (Record, p. 54), and have filed their bond for costs (Record, p. 81).

JURISDICTION.

The question of jurisdiction is raised by the demurrer of Clark. He demurred, and his counsel argued the demurrer, solely on the ground that the bill was, "in substance and effect, a suit in equity against the State of Rhode Island."

The demurrer was rightly overruled. The court may perhaps, in certain cases, refuse to give relief prayed for, on the ground that to grant it would affect a State; but the question of jurisdiction is to be determined solely by the parties to the record. If a State is a party defendant, the court has no jurisdiction; but, if the State is not a party on the record, then it is no objection to the *jurisdiction* that a decree may affect the interests of the State, whatever reason it may be for declining to make the decree.

In this suit, the State is not a party to the record. Even if Clark had been described as Treasurer, the suit would not have been against the State. Still less will it be so, when he is sued simply as an individual.

Osborn v. *Bank of United States*, 9 Wheat. 738, 857, 858.
Davis v. *Gray*, 16 Wall. 203, 220.
The Arlington Case.
Gov. of Georgia v. *Madrazo*, 1 Pet. 110, 122, 123.

INTEREST OF THE STATE OF RHODE ISLAND.

Although the interest of the State of Rhode Island in the subject-matter of the suit furnishes no reason why the court should not take jurisdiction, yet it may be argued that such interest prevents the court from granting relief.

The plaintiffs seek relief on two distinct grounds: —

First. That the delivery of the note was *ultra vires*, and the Treasurer has no right to retain it.

Secondly. That the note was a pledge, which the plaintiffs have a right to redeem on paying the damages to secure the payment of which it was pledged.

First. The plaintiffs on the first ground seek relief for a tort. If the directors had no authority to give the note to the Treasurer, it is a tort in him to retain it. Had he been the Treasurer of a private corporation, he would have been subject to suit; and the fact that he is the Treasurer of a State, although it may prevent the State being sued, will not free him from liability. That this is true, and that it is as true when relief is sought at equity as when it is sought at law, is not open to discussion in this court, It is settled by *Osborn* v. *Bank of United States*, 9 Wheat. 738, affirmed as that case has lately been by *The Arlington Case*. In each of those cases, the circumstances were much stronger in favor of the public agent than they are here.

Secondly. The other case for relief admits that the note was properly delivered, and was delivered as security; but contends that there is no longer any reason why it should be retained as security. It is in substance a bill to redeem, or, rather, to have property delivered up by one who has now no beneficial interest. but who holds it as a dry trustee.

This is not a case in which money or chattels or land, the property of the railroad company, has been delivered or conveyed to the State of Rhode Island. The property which the assignees of this corporation seek to recover is not in the possession of the State. It was in the possession of the City of Boston. It is now in the possession of the Circuit Court. Fortunately for the ends of justice, the State has not got the money into its clutches. On the contrary, it has come into court claiming the fund; and, when a State is in this position, not holding on to property in its possession,

but seeking to get property from others, it is in no better case than an individual, and equally with an individual it must submit to do justice and equity.

The doctrine of this court is clear. That doctrine is

I. No suit will lie against a State as a defendant, and no suit *in rem* will lie against property claimed by a State and in the possession of its officers.

II. The court will not refrain from determining the rights of a plaintiff in property because a State claims a right therein, if the property is not in the custody of an officer of the State.

III. The court will not refrain from determining the right of a plaintiff in property (in a proceeding not *in rem*) because a State claims a right therein, although the property is in the custody of an officer of the State.

On this last proposition there has been a difference of opinion in this court; but on the first two there has been no such difference, and it is within them that the present case falls. The plaintiffs have no need to invoke the aid of the third proposition.

In *United States* v. *Peters*, 5 Cr. 115, in a suit *in personam* to recover money in the hands of the executors of the Treasurer of Pennsylvania, that State contended that it was entitled to the money, but this court directed a decree for the plaintiffs.

In *United States* v. *Wilder*, 3 Sumner, 308, it was *held* that a carrier had a right to withhold property in his possession, though admitted to be the property of the United States, until they had contributed their share toward general average.

Judge Story then said: "It is said that, in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclusion is deduced that there can be no remedy *in rem*. Now, I confess that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground why the remedy *in rem* should be held to exist. I cannot therefore but think that the circumstance that the United States can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien created by the maritime law, does in fact furnish a strong reason for enforcing it."

In *The Siren*, 7 Wall. 152, a prize in the custody of United

States officers was held liable for a collision, and the proceeds in the registry after condemnation were subjected to the claim of the owners of the vessel injured.

It may be said that, in these last two cases, the United States was the party instituting the suit; but the decision of *The Davis*, 10 Wall. 15, fully covers the present case, and in that decision the court was unanimous. There salvors instituted a suit against property of the United States, and it was held that it would lie, because the property was not taken out of the custody of the United States.

Finally, the principle of *The Arlington Case* is so entirely conclusive that it would be a work of supererogation to argue farther.

In England, the courts have been supposed to go to greater lengths in favor of the sovereign than this court has done; but, even in England, this bill would be maintainable.

In *Casberd* v. *A. G.*, 6 Price, 411, 463, the estate of a crown debtor had been seized on an extent and sold, and the Court of Exchequer, against the Crown's objection, sustained a bill in equity by an equitable mortgagee to be first satisfied out of the proceeds. In this case, there was a debt due to the Crown and judgment for the Crown and execution for the Crown and levy made; yet, inasmuch as the money had not actually come into the possession of the Crown, the court gave effect to the equities of the parties. In this suit, we seek to have those equities established in a debt where the sovereign has obtained neither judgment, execution, nor levy.

So when property subject to an equitable mortgage has passed to the Crown, although the court cannot order the Crown to convey, it will put the mortgagee in possession of the property. *Hodge* v. *A. G.*, 3 Y. & C. 342.

In *Gladstone* v. *Musurus Bey*, 1 Hem. & M. 495, the plaintiff obtained an injunction to restrain a bank from giving up to a foreign government securities, which the plaintiff claimed, and which were also claimed by that government.

Lariviere v. *Morgan*, L. R. 7 Ch. 550, was a bill in equity by a contractor with the French government to get possession of money alleged to have been deposited by that government in England for the payment of money due under the contract. Lord Hatherley, C., said: "I will put the case of a foreign government having placed in this country a sum of money, and having charged it with certain trusts to be performed, subject to which the balance is to be paid back to the foreign government. Is it possible to say that, in such a

case, the trustee is not liable to perform the trust, because the foreign government, one of the *cestuis que trust*, cannot be made to appear. There is great analogy between this case and the case of an interpleaded suit." The House of Lords held that there was no trust in favor of the plaintiffs; but Lord Cairns, C., said: "No doubt the court, having a trust fund under its control, might well proceed to administer that fund, even although a foreign government might be interested in it, and might not be before the court, or subject to the jurisdiction of the court." L. R. 7 H. L. 423, 430.

The plaintiffs could have recovered in this suit, even if the State of Rhode Island had not appeared. For the fact that it cannot be made a party defendant is sufficient reason for not making it a party defendant, and the bill cannot therefore be objected to for want of parties.

A. G. v. *Baliol College*, 9 Mod. 409.
Osborn v. *United States Bank*, 9 Wheat. 738, 846, 847.
Davis v. *Gray*, 16 Wall. 220.

But the State has appeared voluntarily and claimed the fund and has thereby submitted itself to the jurisdiction of the court. (Record, p. 51.)

Brunswick v. *Hanover*, 6 Beav. 1, 39.

Interpleader will lie against the Crown, *Reid* v. *Stearn*, 1 L. T. (N.S.) 539; S.C. 6 Jur. 267; and the position of affairs in this case is like that which would arise in an interpleader suit.

See *Lariviere* v. *Morgan*, L. R. 7 Ch. 550, 560.

The State, having voluntarily appeared and claimed the fund in court, cannot take any objections to the want of jurisdiction over it, or to the form of the proceedings, or to the manner in which the fund has got into court, except so far as it has reserved the right to do this by inserting these words in its appearance and claim,—"without prejudice to the demurrer of said General Treasurer."

The demurrer of the Treasurer asked that he might be dismissed from the suit, because the suit was really against the State of Rhode Island. The Treasurer is entitled to the judgment of this court on the soundness of that demurrer, notwithstanding the appearance of the State. The appearance and claim of the State is not to debar the Treasurer of the right of taking the judgment of this court upon the soundness of his demurrer. That is the effect

of the words "without prejudice to the demurrer of said General Treasurer," and that is their only effect.

The demurrer is clearly bad, for the ground that the whole transaction was *ultra vires* is taken on the bill; and *Osborn's Case* is conclusive that, if the delivery was without authority, the bill can be maintained against the Treasurer.

So the case can be treated as if those words had not occurred in the appearance and claim, and therefore

I. The State has submitted itself to the jurisdiction of the court; and its claim must be decided in accordance with all the authorities, *The Siren*, *The Davis*, etc., on the same principles of justice and equity as if it were a private individual.

II. It cannot object that this was not a proper mode of proceeding, or that the money was not properly paid into the registry.

MERITS.

The plaintiffs claim the money in the registry upon two grounds: —

I. The acceptance by the Company of the Act of Rhode Island was *ultra vires*, and the bond therefore void.

II. If the bond is not void, the State of Rhode Island is entitled to money from the registry only to the amount of damage which it can show that it has received, and it has shown no damage.

PRELIMINARY QUESTION.

Before taking up these two main questions, there is an incidental matter which it will be convenient to dispose of.

The city of Boston has paid into the registry of the Circuit Court not only $100,000 principal, but also $16,889.58 interest (Record, p. 50).

Whatever the fate of the principal fund, the State of Rhode Island has no claim to this interest.

I.

The Act called for a "bond with sureties" (Record, p. 38). No sureties were given on the bond; but the note in question was delivered and accepted as "security of said bond and condition according to the intent and meaning" of said Act (Record, p. 41).

The note stands in the place of a surety; and the property of

the Company represented by it is liable to the extent to which a surety would be liable, and no farther.

Therefore, so far as the proceeds of the note are not needed to discharge the liability of such surety, they belong to the plaintiffs as trustees for the general creditors.

II.

In this case, the $100,000 principal would have been the limit to the liability of a surety on the bond. For, however it may be against a principal obligor, interest runs against a surety only from the time when he is in default, and there was no default in this case, for there was never any demand.

Knight v. *Maclean*, 3 Bro. Ch. 496.
Warner v. *Thurlo*, 15 Mass. 154.
Clark v. *Bush*, 3 Cow. 151, 158.
Fairlie v. *Lawson*, 5 Cow. 424.
See *McClure* v. *Dunkin*, 1 East, 436.
Brainard v. *Jones*, 18 N. Y. 35.
Bank of Brighton v. *Smith*, 12 All. 243.

III.

The statement therefore in the interlocutory decree (Record, p. 48) that the Treasurer be allowed to recover out of the proceeds of the note the sum or sums "for which any surety or sureties, and for which the principal obligor on said bond, is and would be liable," must be considered as inadvertent, and would have been corrected, had the decree been shown to counsel. The words, "and for which the principal obligor," must be stricken out. Otherwise, the Treasurer would have a preference which his pledge did not authorize over the general creditors of the corporation.

Coming now to the two questions stated above: —

FIRST MAIN QUESTION.

The acceptance by the Company of the Act of Rhode Island was *ultra vires*, and the bond therefore void.*

* "The statutes of any of the States affecting the Boston, Hartford & Erie Railroad, or any of the railroads of which it was formed, or any railroad connected therewith, may be referred to." (Record, p. 21.) The material parts of these statutes are printed at the end of the brief.

The Boston, Hartford & Erie Railroad Company was chartered by the State of Connecticut, June 25, 1863. Under the authority of its charter, it purchased in August 1863, the property and franchises of the Hartford, Providence & Fishkill Railroad Company, a corporation created by the joint action of Connecticut and Rhode Island; and that purchase is recited and was confirmed by an Act of Rhode Island in January 1865 (Brief, p. 41). In January 1869, the State of Rhode Island passed an Act authorizing the Boston, Hartford & Erie Railroad Company to build the road in question. R. I. St. 1869, p. 186. (Record, pp. 31–38.)

I.

The general rule of law is clear: —

A corporation chartered in one State cannot do acts in another State which are not authorized by the charter, although they are permitted by such other State.

The rules to be applied to the construction of corporate grants are well known. "A corporation created by statute can exercise no powers, and has no rights except such as are expressly given or necessarily implied."

Huntington v. *Savings Bank*, 96 U. S. 388, 393.

A corporation can make no contracts and do no acts, either within or without the State which creates it, except such as are authorized by its charter.

Bank of Augusta v. *Earle*, 13 Pet. 519, 588, 589.

Cleveland, etc., R.R. Co. v. *Speer*, 56 Pa. St. 325.

See *Pierce* v. *Crompton*, Sup. Ct. R. I. Index Decisions, March T. 1881, p. 18.

Indeed, unless authorized to do so expressly, or by necessary implication, it can do no acts at all outside of the incorporating State.

Bank of Augusta v. *Earle*, 13 Pet. 589.

The reason why acts done without authority outside of the incorporating State are *ultra vires* is precisely the same as the reason why acts done inside of the State without authority are *ultra vires;* namely, that the capital stock of a corporation is in the nature of a trust fund.

Upton v. *Tribilcock*, 91 U. S. 45–48.

Great Eastern Railway Co. v. *Turner*, L. R. 8 Ch. 149, 152.

The terms of the trust being that it shall be used for the purposes specified in the charter, and for no other purposes:—

(1) In the interest of the public, that the ability of the corporation to render to the public those benefits in consideration of which the corporate privileges were granted may not be impaired;

Pearce v. *Madison, etc., Railroad Co.*, 21 How. 441, 443;
East Anglian Railways Co. v. *Eastern Counties Railway Co.*, 11 C. B. 775, 812;

(2) In the interest of the creditors of the corporation, that the fund, to which alone they can look for the payment of their debts, shall not be wasted by being applied in any other manner than that authorized by the charter.

Upton v. *Tribilcock*, *ubi sup.* *Ashbury, R. C. & I. Co.* v. *Riche*, L. R. 7 H. L. 653, 667, 678, 687, 691, *per* Lords Cairns, Chelmsford, Hatherley, and O'Hagan.

II.

The building of the road which the bond in question was conditioned to complete was not authorized by Connecticut, the State by which the Company was chartered.

The language of the Connecticut charter is as follows: "Said Boston, Hartford, and Erie Railroad Company may purchase . . . the franchise, the whole or any part of the railway or railway property of any railroad company, located in whole or in part in this State, whose line, or a portion of whose line, of railway, constructed or chartered, now forms part of a railway line from the harbor of Boston, passing through Thompson to Willimantic, and from Providence through Willimantic to Hartford, Waterbury, and thence toward the North River, with the purpose of reaching a point at or near Fishkill, in the State of New York; . . . and said Boston, Hartford, and Erie Railroad Company may make any lawful contract with any other railway company with which the track of said railroad may connect, in relation to the business or property of the same; and may take lease of any railroad, or may lease their railway to, or may make joint stock with, any connecting railway company in the line of, and forming a necessary part of, and running in the same general direction as, their said route, and between its terminal points."

That is to say, Connecticut authorized this corporation to do the following acts outside of the State:—

(1) To purchase any railway, if any portion of its line was located in Connecticut, and *formed part of the railway line from Boston to Willimantic and Waterbury, and from Providence to Willimantic and Waterbury, and thence toward the North River.*

(2) To take a lease of any railroad, make a lease to it, or make joint stock with it, *provided it formed a necessary part of the line of railway above described.*

(3) To make a lawful contract as to its business and property with any railway company connecting with the road of the Boston, Hartford & Erie Railroad Company.

The Rhode Island Statute authorized "the Boston, Hartford & Erie Railroad Company, a corporation created by the General Assembly of the State of Connecticut," to construct a road commencing at Providence, and running between the villages of Pawtucket and Lonsdale, to the easterly line of the State of Rhode Island near the village of Valley Falls, there to meet and connect with a railroad from the direction of Boston. R.I. St. 1869, p. 186, § 1 (Record, pp. 31, 32); that is, a road forming part of a line from Providence to Boston.

The whole effect of this Statute of Rhode Island was to permit the building of this railroad, if the Company was authorized to build it by the Connecticut charter.

This Statute authorized "the Boston, Hartford & Erie Railroad Company, a corporation created by the General Assembly of the State of Connecticut," to build and operate the road.

The building of this road was not authorized by the Connecticut charter for two reasons: —

1st. The character of the act contemplated by the Rhode Island Statute was entirely different from that of the acts authorized by the charter as to roads lying wholly outside of Connecticut. As to such roads, the only power given was to lease or to make joint stock. The Company had no power even to purchase, much less to build, such roads. There is a substantial difference between making joint stock with a road and purchasing or building it. If joint stock is made, the capital, which the joint corporation has at its disposal for operating both roads, is the capital of both roads. In case of a purchase or building, the capital of the corporation is diffused; and the power of the corporation to run effectively the old road is weakened by so much.

2d. The road in question was outside the location authorized by the charter.

The location authorized ran in a straight line from the western boundary of Connecticut to Willimantic. At Willimantic, it forked, one line of the fork going to and ending at Boston, the other going to and ending at Providence.

It was no part of the location to complete the triangle by running a line from Boston to Providence.

It is therefore clear (apart from the purchase of the Hartford, Providence & Fishkill Railroad Company, and the confirmation of that purchase by the Legislature of Rhode Island, which are discussed below) that the building of this road and the giving of the bond were *ultra vires*. The case stated concisely is this:—

A corporation is chartered in Connecticut to purchase (*inter alia*) a certain railroad in Rhode Island. This Connecticut corporation afterward, without procuring any change in its charter, obtains leave from Rhode Island to build in that State a railroad other than the one which it was authorized to purchase.

III.

But it may be said that the Boston, Hartford & Erie Railroad Company was authorized by its charter from Connecticut to purchase the franchise of the Hartford, Providence & Fishkill Railroad Company; that it did purchase the franchise of the Hartford, Providence & Fishkill Railroad Company; that part of the franchise of the Hartford, Providence & Fishkill Railroad Company was the right to build the road in question; and that consequently the Boston, Hartford & Erie Railroad Company had the right to build the road in question.

The Hartford, Providence & Fishkill Company, as appears from the Statutes of Connecticut and Rhode Island annexed to the brief, was a corporation created by the union of a Connecticut corporation called the Hartford, Providence & Fishkill Railroad Company, chartered 1849 (Brief, p. 36), which was authorized to run a road across Connecticut from the Rhode Island line to the New York line; and a Rhode Island corporation called the Providence & Plainfield Railroad Company, chartered 1846 (Brief, p. 39), which was authorized to run a road from Providence to the western boundary of Rhode Island.

The union of the two corporations, under the name of the Hartford, Providence & Fishkill Railroad Company, was confirmed in 1852 by the States of Connecticut and Rhode Island. (Brief, pp. 37, 40.)

The Boston, Hartford & Erie Railroad Company was authorized by its charter from the State of Connecticut, June 25, 1863, to purchase the franchise of any railroad company located in whole or in part in Connecticut, the whole or a portion of whose road then formed a part of the line from Providence through Hartford west.

The Hartford, Providence & Fishkill Railroad Company was then located in part in Connecticut, and the whole of its road then formed a part of the line from Providence through Hartford west.

The Boston, Hartford & Erie Railroad Company was therefore authorized by its charter to purchase the franchise of the Hartford, Providence & Fishkill Railroad Company. And it did purchase that franchise.

If, then, the franchise of the Hartford, Providence & Fishkill Railroad Company included the right to build the railroad in question, then the Boston, Hartford & Erie Railroad Company had that right.

But the franchise of the Hartford, Providence & Fishkill Railroad Company did not include the right to build this railroad.

When the Boston, Hartford & Erie Railroad Company bought the franchise of the Hartford, Providence & Fishkill Railroad Company, that franchise certainly did not include the right to build this railroad. The only road which the franchise then covered was a road from Providence west.

The argument of the defendants must be that, when Connecticut authorized the Boston, Hartford & Erie Railroad Company to purchase the franchise of a corporation which was made up of a Rhode Island as well as of a Connecticut corporation, it thereby authorized it to accept any franchise which the State of Rhode Island might hereafter grant it.

The State of Connecticut authorized the Boston, Hartford & Erie Railroad Company to accept certain rights from the State of Rhode Island, but that is no authority for their accepting other rights from Rhode Island entirely outside of their charter.

Rhode Island, it is true, had control over its own corporation; but it did not have the full control over the funds of the Boston,

Hartford & Erie Railroad Company, of which its own corporation formed but a small part.

The defendant's position leads necessarily to the conclusion that, if a railroad is chartered by a great State, say New York, to run across it, and it needs, to complete its line, a couple of miles in Pennsylvania, the consent of New York to its acquiring a Pennsylvania charter for those two miles gives the company the right, without the consent of New York, to spend its funds in building and operating ramifications all over Pennsylvania, provided Pennsylvania does not object.

Indeed, the State of Rhode Island does not profess, by the Act in question, to be extending the powers of any corporation of its own. It gives authority to build this road to the Boston, Hartford & Erie Railroad Company, a corporation created by the General Assembly of Connecticut.

IV.

These assignees, in interposing the defence of *ultra vires*, are not taking advantage of a technicality in order to avoid paying for benefits actually rendered to them and enjoyed by them, but are insisting on a substantial defence which is interposed to prevent the ends of justice from being perverted.

The building of this road was entirely outside the purpose of the charter. The object of the charter was to open up direct railroad connection between Boston and the West, and Providence and the West, by bringing under one management the railroads then built, or then chartered to be built, between Boston and the Erie Railroad in New York, and between Providence and the Erie Railroad.

The powers given the corporation were strictly limited to the attainment of this object. Making railroad communication between Boston and Providence was not within the scope of the charter or the several powers given to carry out that scope, and was *ultra vires*.

Eastern Counties Railway Co. v. *Hawkes*, 5 H. L. 331, 345.
Pearce v. *Madison, etc., R.R. Co.*, 21 How. 441.
Hood v. *New York & New Haven R.R. Co.*, 22 Conn. 502.
Penn., D. & M. Steam Nav. Co. v. *Dandridge*, 8 Gill & J. 248.
East Anglian R. Co. v. *Eastern Counties R. Co.*, 11 C. B. 775.

The present case is a much stronger case than *Pearce* v. *Madison, etc., R.R. Co., ubi supra*, and *East Anglian R. Co.* v. *Eastern*

Counties R. Co., ubi supra; for there the companies were allowed to escape paying for benefits actually enjoyed, because their contracts were *ultra vires*, while here the whole matter is still executory. The grant has never been used by the corporation; and, if this sum of $100,000 is retained by the assignees, the parties will be left *in statu quo.* When a grant has never been used, and has already ceased by its own limitation, as is the case here, it is clear on all the authorities that the defence of *ultra vires* is well taken; for the decisions which go the farthest in disallowing this defence concede that, so long as the contract is executory, it advances the ends of justice and is to be allowed.

The defence is interposed in this case, not by the corporation, but by the assignees in bankruptcy of the corporation, who were appointed in 1870, and had no right or power to build this road. It is, in fact, interposed, through the assignees, by the creditors of the corporation,— the very persons for whose interest a corporation is prohibited from spending its property in any way it may choose, and is limited to a specified business.

In short, the circumstances under which the defence of *ultra vires* is interposed in this case are entirely different from those in which it is usually interposed, and are such that the defence, if it is ever to be allowed, must be allowed here.

Those circumstances are: —

A Connecticut corporation obtains from Rhode Island a grant of the right to build a railroad *ultra vires*, and contracts in Rhode Island to complete the road by a fixed time, and gives security therefor to the extent of $100,000.

Before the time fixed arrives, and before the grant is used, the creditors of the corporation put it into bankruptcy, and take charge by the assignees in bankruptcy of its affairs.

The creditors stop building the road,— *i.e.*, stop expending the money of the corporation in a way originally forbidden the corporation in their (the creditors') interest.

And when suit is brought against the corporation on the contract to recover damages for the failure to complete the road, and to realize on the security given to secure those damages, the creditors object that the making of the contract and the giving of the security were forbidden the corporation in their own (the creditors') interest.

They say: "We have disregarded the contract, because to keep

it was to spend the capital stock to our own detriment, and in a way in which the corporation was forbidden to spend it, because it was to our detriment; and we now resist a recovery for breach of the contract for the same reason; and it is certainly true that, if we had the right to disregard the contract, we have the right to prevent you from appropriating this $100,000, the property of the corporation, to compensate yourself for breach of the contract."

SECOND MAIN QUESTION.

The State of Rhode Island can recover on the bond in question, if valid, only the damage it proves that it has really sustained from the failure to build the road.

I.

The bond is a simple bond in the sum of $100,000 conditioned for the completion of the road before Jan. 1, 1872. (Exhibit C., Record, pp. 38, 39.)

The form of the bond was approved by the Attorney-General of Rhode Island as being in full compliance with the statute, and was accepted as such by the Governor and Legislature. (Exhibits E. and H., Record, pp. 41–43.)

The obligation imposed by a bond is a matter perfectly familiar not only to lawyers, but to every business man. It is that the obligor is bound for the damages caused by the breach of the condition to an amount not exceeding the penal sum, and that the penal sum is not itself due on a breach. This is as well known as that a bill of exchange payable to order is negotiable.

The defendants do not deny this, as a general rule; but they say that this bond is an exception,—that, on the breach of this particular bond, the penal sum is due as liquidated damages.

The principle upon which equity at first, and afterward statutes universally passed, have given remedies on bonds has sometimes been incorrectly stated.

Equity construed a bond, according to the original intent, to be an obligation to perform the condition, and accordingly held that the obligee was entitled to a decree directing the obligor to specifically perform the act set forth in the condition.

Anonymous, Mosely, 37.
Holtham v. *Ryland*, 1 Eq. Cas. Ab. 18, pl. 8.
Parks v. *Wilson*, 10 Mod. 515, 517, 518.
Hobson v. *Trevor*, 2 P. Wms. 191.

And the obligation to pay the penal sum equity regarded as collateral security for the obligation contained in the condition; and, if the latter obligation was broken, the penal sum was security for the damages.

As it is well put by Lord Thurlow in *Sloman* v. *Walter*, 1 Bro. C. C. 418, 419: "When a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed and the penalty only as accessional, and, therefore, only to secure the damages really incurred." That is, equity held that the giving of a bond in the penal sum of £1,000, conditioned for the payment of £500, was precisely the same as giving a note for £500 with another note of £1,000 as collateral security; and so the giving of a bond in the penal sum of $100,000 conditioned to complete a house by Jan. 1, 1872, is precisely the same in equity as giving a covenant to build the house by that time and a note for $100,000 as collateral security for the covenant.

In *Blake* v. *East India Company* (decided in 1673, and reported in Finch's Reports, 117, 119, *sub nom. East India Company* v. *Blake & e contra*), which was the case of a bill to be relieved from paying to the East India Company the sum of £26,000 agreed to be paid by the plaintiff (who was an agent of the Company in India), if he dealt in goods dealt in by the Company, the Company stated in its answer that, by many years' experience, it had found its trade ruined by its own factors dealing in the same goods as those in which it dealt, and had therefore found it necessary to restrain its factors from dealing in those goods; that it formerly took bonds of its factors with large penalties conditioned that they should not trade in those goods, "and yet, notwithstanding such bonds, the factors did trade in them at pleasure; because when they returned, and the bonds were put in suit, they were relieved by this court against the penalties, and trials at law directed to prove their damages." And, therefore, for sixteen years past (*i.e.* since 1657) it had, by the advice of learned counsel, required its factors to covenant upon certain stated damages that they would not trade in those goods (pp. 120, 121).

For cases since 1657, see: —

Tall v. *Ryland*, 1 Ch. Cas. 183. { Condition to be good neighbors and not disparage obligee's stock in trade. } 1671.

Benson v. *Gibson*, 3 Atk. 395.	Condition to serve faithfully as agent of obligee for stated time abroad in buying goods.	1746.
Hardy v. *Martin*, 1 Cox, 26; s. c. 1 Bro. C. C. 419, note †.	Condition not to exercise trade of retailing brandy.	1783.
Sloman v. *Walter*, 1 Bro. C. C. 418.	Condition to give obligee use of a specified room.	1784.
Errington v. *Aynesley*, 2 Bro. C. C. 341.	Condition to build and maintain a bridge, penal sum being price paid for building and maintaining.	1788.

This principle is entirely distinct from the principle on which relief is given against the forfeiture of an estate determinable on a condition subsequent, and like cases. That principle is this: By payment of the money due after the time fixed, the condition is specifically performed, except in the matter of time; and the payment of interest puts the other party in the same situation as if there had been no failure in the matter of time. It is necessary to entitle one to relief, on this principle, that there should be a substantial specific performance. Thus, *per* Lord Holt in *Bertie* v. *Falkland*, 3 Ch. Cas. 129, 131: "Equity may interpose when the substance is performed, though not in every matter literally pursued; but, when it is in no part performed, as in this case, it can never help." It is also necessary to show that the payment of damages puts the other party in the same situation as he would have been in, had the condition been literally performed, in the same sense that interest puts a creditor in the same situation as if the money due had been paid on the day. It is not enough to show that the damages could be estimated by a jury; but it is necessary to go farther, and show that there is some rule by which the court, as matter of law, can measure the damages, and know that they are full compensation. (See Lord Eldon in *Reynolds* v. *Pitt*, 19 Ves. 134, 142; *Hill* v. *Barclay*, 16 Ves. 402, 404.) On this ground, relief is refused where leaseholds are forfeited by breach of covenants to repair (*Hill* v. *Barclay*, *Bracebridge* v. *Buckley*, 2 Price, 200), and indeed of all covenants except to pay money. (See Lord Eldon in *Hill* v. *Barclay*, *Reynolds* v. *Pitt*; and see generally Lord Holt in *Bertie* v. *Falkland*, 3 Ch. Cas. 129, 131; *Marks* v. *Marks*, Prec. Ch. 486; Lord Eldon in *Hill* v. *Barclay*, 16 Ves. 402, 18 Ves. 56; *Reynolds* v. *Pitts*, 19 Ves. 134; *Peachy* v. *Somerset*, 1 Stra. 447, 453.)

But in case of bonds, except those conditioned for the payment of money, no relief could ever be given on this principle.

Certainly, none of the above cases, in which relief was given against the penal sums of such bonds, can be explained on this principle. In none of these cases was there a substantial, specific performance; and, in the following, the damages arising from breach of the condition were entirely problematical:—

Blake v. *East India Co.*, Finch, 117, 119.
Tall v. *Ryland*, 1 Ch. Cas. 183.
Benson v. *Gibson*, 3 Atk. 395.
Hardy v. *Martin*, 1 Cox, 26.

These cases, therefore, were decided on the principle stated by Lord Thurlow in *Sloman* v. *Walter*, and which was then declared by Lord Thurlow to be "too strongly established in equity to be shaken."

There are no late cases in equity on bonds, because the doctrines of equity have been taken up into the common law by virtue of statutes, of which 8 & 9 Wm. III., c. 11, § 8, was the first.

That statute was entitled "An Act for preventing frivolous and vexatious suits," and provided that in all actions on any bonds or on any penal sums for the non-performance of covenants, agreements, etc., the plaintiff might assign as many breaches as he pleased, and the jury should assess the damages caused by such breaches; that judgment should be given for the penal sum, but on payment of the damages assessed by the jury there should be a stay of execution, and the judgment should stand as security for future breaches.

That statute was practically inoperative until 1790; for, until then, it was assumed that it was not compulsory, and that the plaintiff had the right to elect whether to proceed under the statute or not. But, in 1790, it was definitely settled that, the main object of the statute being to relieve obligors (*Savile* v. *Jackson*, 13 Price, 715, 719; *Smith* v. *Bond*, 10 Bing. 125, 131), it was to be construed liberally and to be compulsory (*Hardy* v. *Bern*, 5 T. R. 636; *Roles* v. *Rosewell*, ib. 538), and to include all bonds, except those against which courts of law could relieve under other statutes without the intervention of a jury. *Roberts* v. *Mariett*, 2 Wms. Saund. 187 (ed. of 1845), note (2); *Collins* v. *Collins*, 2 Burr. 820; *Welch* v. *Ireland*, 6 East, 613; *Smith* v. *Bond*, *ubi supra*; Leake's Digest of Law of Contracts, 144, 1083.

The practical effect of this statute was to adopt the rule in equity, and was concisely stated by Baron Parke in *Beckham* v. *Drake*, 2 H. L. 579, 629: "That statute in effect makes the bond a security only for the damages really sustained."

The exact effect of 8 & 9 W. III. c. 11, § 8, is to prescribe that, in every action brought in England on a bond conditioned for a collateral act, nothing shall be recovered but the damages proved to have been really sustained by the failure to perform that collateral act.

The several States, including Rhode Island, have passed statutes in substance like the English statute.* It is unnecessary to consider them particularly, because the U. S. Rev. Sts. § 961, is explicit. "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And, when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."

Accordingly, neither in England nor America, neither in equity nor under the statutes, has the penalty of a bond been considered as liquidated damages.

In some cases where a bond has been given not to commit a crime, *e.g.*, not to defraud the revenue, equity has refused to interfere, not because the penalty is liquidated damages, but because the penalty is the punishment imposed for committing a crime.

See *Benson* v. *Gibson*, 3 Atk. 395, 396.
Treasurer v. *Patten*, 1 Root. 260.
United States v. *Montell*, Taney, 47.

There are two *dicta* which, in this connection, should in fairness be referred to.

* Note.— The preamble to the Mass. Prov. Sts., 1698, *c.* 22 (1 Prov. Laws, 356) shows how ancient is the doctrine in this country: "Whereas the respective courts of justice within this province are by law empowred, where the forfeiture of any penal bond shall be found, in the entring up of judgement in such case, to chancer the same unto the just debt and damages, the practice whereof is found to give great ease and satisfaction unto His Majesty's subjects, whereby oppression, delay and great costs and charges are prevented, which otherwise would unavoidably arise," etc. The act goes on to give equitable relief in other matters.

In *Roy* v. *Beaufort*, 2 Atk. 190, 193, 194, equity granted relief because the bond had been put in suit inequitably; but Lord Hardwicke is reported to have said that the penalty was liquidated damages. It is exceedingly doubtful, however, if Lord Hardwicke ever made such a remark.

The bond in question, in *Roy* v. *Beaufort*, was given by a boy arrested for poaching and by the boy's father, conditioned that the boy should not trespass again by fishing, shooting, etc.; and Lord Hardwicke likened it to a bond not to defraud the customs, and, when the case was cited to Lord Hardwicke only five years after, in *Benson* v. *Gibson* (a case in which it was eminently proper that the *dictum* should be followed, if it was ever to be followed), his Lordship distinguished the case as falling within the same class, *i.e.*, bonds not to defraud the revenue, against the breach of which no relief is given, not because the penalty is liquidated damages, but because the obligor is guilty of a crime. 3 Atk. 395, 396.

Atkyns, too, it should be remembered, is a notoriously bad reporter;* and the report of this very case bears on its face marks of slovenly reporting.†

Though the supposed remark of Lord Hardwicke in *Roy* v. *Beaufort* was cited in all the subsequent cases of *Benson* v. *Gibson*, *Hardy* v. *Martin*, *Sloman* v. *Walter*, and *Errington* v. *Aynesley*, and it was strongly urged in argument that the bonds in question in those cases were by way of stated damages, in none of them was the remark followed, but in all of them the bonds were construed to be by way of security.

In *United States* v. *Hatch*, 1 Paine, 336, which was the case

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* Note 1.— In *LaVie* v. *Philips*, 1 W. Bl. 570, 571, decided in 1765, the court interrupted counsel, who cited a case from 1 Atk., to say, "Atkyns must not be cited as authority."

In *Olive* v. *Smith*, 5 Taunt. 56, 64, Sir James Mansfield, C. J., says, "Unfortunately Lord Hardwicke's judgments in general are known only by Mr. Atkyns' reports, which are extremely inaccurate."— See, to same effect, 6 East, 29 note, 2 Wooddeson's Lectures, 362; 2 Kyd on Corp. 189, *n.*; 1 Kent Com. 494. Counsel *arg.* in *Keily* v. *Monck*, 3 Ridgeway P. C. 205, 240, who characterizes his reports as "flimsy notes."

† Note 2.— The report states in the beginning, p. 190, that the case was a bill to be relieved against a judgment "on a bond in the penalty of £100, and likewise excessive damages of £40"; and again, at the very end, p. 195, it speaks of "the £40 damages." "The £40 costs of suit," spoken of on p. 191, were evidently referred to throughout.

of a bond under St. 1803, c. 9, § 1 (2 Sts. at Large, 203), U. S. Rev. Sts. § 4576, and in which it was held that the penal sum could not be chancered, the language of the latter part of the opinion speaks of the $400 (the amount of the penal sum) as liquidated damages. But that decision was carefully considered by Taney, C. J., in *United States* v. *Montell*, Taney, C. C. 47, 54, who declared that "the only ground upon which it can be maintained" was the ground taken in the early part of the opinion; namely, that St. 1803, c. 9, § 1, should be construed to create a crime, affix as a punishment for its commission a fine of $400, and require a bond as security for the payment of it; and also that, though in the language of the opinion the $400 is spoken of as liquidated damages, the notion that it was so "is hardly consistent" with this construction of St. 1803, c. 9, § 1. In short, the case falls within bonds not to defraud the revenue.

Opposed to these casual remarks are the distinct statements of Lord Loughborough, Sir Lloyd Kenyon, and Lord Eldon, that the penalty of a bond can never be liquidated damages.

In *Hardy* v. *Martin*, 1 Cox, 26, 27, Lord Loughborough said: "The penalty is never considered in this court, as the price for doing what a man has expressly agreed not to do."

And in *Errington* v. *Aynesley*, 2 Bro. C. C., 341, 343, where a bond was given to secure performance of an agreement to build a bridge, and the sum paid for the building of the bridge was in the same amount as the penal sum of the bond, Sir Lloyd Kenyon said: "Although the sums paid here may regulate the damages, the sum contained in the bond continues still a penalty. How it can be stipulated damages, I confess I cannot see."

And Lord Eldon in his exhaustive opinion in *Astley* v. *Weldon* (in 1801), 2 B. & P., 346, 350 (and it is to be remembered in this connection what an enemy of equitable relief against legal rights the cases of *Hill* v. *Barclay*, 16 Ves. 402, 18 Ves. 56, and *Reynolds* v. *Pitt*, 19 Ves. 134, show Lord Eldon to have been), says: "The case of *Sloman* v. *Walter* did not stand in need of this principle: for there by the very form of the instrument the sum appeared to be a penalty; in which cases a court of equity could never consider it as liquidated damages, but must direct an issue of *quantum damnificatus*."

But the weightiest argument against considering the penalty of a bond as liquidated damages is that it has not been so treated

in cases in which there were the strongest reasons so to treat it, if it could ever be so considered.

Thus, in *Errington* v. *Aynesley*, 2 Bro. C. C. 341, the condition was to build a bridge, and the penalty was identical with the sum paid as a price for the building.

That is a much stronger case for liquidated damages than the case at bar. To make this as strong a case, the State of Rhode Island should have hired the Boston, Hartford & Erie Railroad Company to build the road, and have paid it $100,000 for doing so.

In the following cases, the damages arising from a breach of the condition were entirely problematical: —

Blake v. *East India Co.;* not to deal in goods dealt in by the East India Company.

Tall v. *Ryland;* to be good neighbors, and not disparage the obligee's stock in trade.

Hardy v. *Martin;* not to exercise the retail brandy trade.

If there was ever a case in which the penalty of a bond should be considered liquidated damages, it would be with bonds not to exercise a trade; and, accordingly, wherever an agreement not to exercise a trade has been by way of *covenant*, a sum named is held by an overwhelming weight of authority to be liquidated damages. See *Galsworthy* v. *Strutt*, 1 Exch. 659; *Blake* v. *East India Co.*, Finch, 117, 119; *Green* v. *Price*, 13 M. & W. 695; *Rawlinson* v. *Clarke*, 14 M. & W. 187; *Price* v. *Green*, 16 M. & W. 346; *Atkyns* v. *Kinnier*, 4 Exch. 776; *Reynolds* v. *Bridge*, 6 E. & B. 528; *Sainter* v. *Ferguson*, 7 C. B. 716; *Holbrook* v. *Tobey*, 66 Me. 410; *Pierce* v. *Fuller*, 8 Mass. 223; *Cushing* v. *Drew*, 97 Mass. 445; *Nobles* v. *Bates*, 7 Cowen, 307; *Williams* v. *Dakin*, 22 Wend. 201; *Jaquith* v. *Hudson*, 5 Mich. 123.

But when, on the other hand, a *bond* has been given not to exercise a trade, the penalty has uniformly been held not to be liquidated damages.

Davis v. *Gillett*, 52 N. H. 126.
Whitney v. *Slayton*, 40 Me. 224.
Caswell v. *Johnson*, 58 Me. 164.
Smith v. *Wainwright*, 24 Vt. 97.
Marvin v. *Bell*, 41 Vt. 607.

There are some cases in which the obligee of a bond has been allowed to recover a sum equal to the penalty; but this has not

been because the *penalty* was liquidated damages, but because the *condition* provided that such sum should be paid as liquidated damages. The contract was to pay the sum named in the condition, and the penalty stood as usual as security for this payment.

Fletcher v. *Dyche*, 2 T. R. 32.
Mercer v. *Irving*, E. B. & E. 563.
Cotheal v. *Talmage*, 9 N. Y. 551.
Smith v. *Smith*, 4 Wend. 468.
Bagley v. *Peddie*, 16 N. Y. 469.
Chase v. *Allen*, 13 Gray, 42.
Leary v. *Laflin*, 101 Mass. 334.
Hodges v. *King*, 7 Met. 583.
Gowen v. *Gerrish*, 15 Me. 273.

In conclusion, therefore, it is clear that, from a period at least as early as the year 1650, down to the present time, bonds have constituted a distinct class of instruments, the effect of which is always the same, in the same sense that the effect of a conveyance to A and his heirs is always the same. Such is the rule of equity. Such was the effect of the statutes.

Consequently, if in a particular case parties have expressed their obligation in the form of a bond, their liability is thereby determined to be an obligation to perform the condition, or pay the damages actually sustained from non-performance thereof.

"Of course, in this class of agreements, as in all others, when the contract takes the ordinary form of a penal bond, the sum fixed will invariably be regarded as a penalty; and this might well be put, at the present day, on the ground of intention, as derived from the writing itself, for this form of instrument is in such common use that persons who resort to it must be held to have in view its legal consequences." 2 Sedgwick, Meas. Dam. (7th ed.) 259, note.

One case there is, the only case which the diligence of the appellants has been able to find, in which the penalty of a bond was held liquidated damages. Under the circumstances, the weight to be attached to it is slight; but it should be mentioned.

In *California Steam Navigation Co.* v. *Wright*, 6 Cal. 258, there was a contract, not in the form of a bond, that the contractor would not permit any boat in which he was interested to navigate certain waters, and that, if he failed to do this, he would pay $15,000. It was held that the $15,000 were liquidated damages. In *Fisk* v. *Fowler*, 10 Cal. 512, a bond for $2,000 was given, conditioned that

the obligor would make a good title to a vessel which he had sold to the obligee. The obligor failed to make a good title; and the court (two judges only), overlooking entirely the difference in the form of the obligation, decided, on the strength of the preceding case, that the amount of the penalty was liquidated damages. The whole opinion is as follows: —

"There is no error in the judgment. This is one of those cases in which it is difficult, if not impracticable, to estimate the exact amount of damage suffered by the failure of the defendant to comply with his contract; and we think the amount of the bond should be considered as liquidated damages, within the rule laid down by this court in *Steam Navigation Co.* v. *Wright*, 6 Cal. 258. Judgment affirmed."

II.

But apart from the circumstance that the agreement is in the form of a bond, the penalty cannot in this case be considered as liquidated damages. In other words, even if the contract had been put into the form of a covenant, that unless the railroad was completed by January 1, the Company would forfeit $100,000, that sum would not be liquidated damages. The tendency of the law is to regard a sum as penalty, because, in that case, it may be apportioned to the loss actually sustained (Shaw, C. J., *Shute* v. *Taylor*, 5 Met. 61, 67), even if it is called liquidated damages. And, therefore, if the sum is in fact called penalty, it is never to be construed liquidated damages. *Tayloe* v. *Sandiford*, 7 Wheat. 13, 17; *Smith* v. *Dickenson*, 3 B. & P. 630, 632; *Smith* v. *Wainwright*, 24 Vt. 97, 102; *Colwell* v. *Lawrence*, 38 N. Y. 71, 77, 78.

A sum named in a covenant is deemed a penalty, if it is to be paid on breach of several stipulations of different degrees of importance.

In re Newman, 4 Ch. Div. 724, 731, 733.
Magee v. *Lavell*, L. R. 9 C. P. 107, 115.
Betts v. *Burch*, 4 H. & N. 506.
Kemble v. *Farren*, 6 Bing. 141.
Heard v. *Bowers*, 23 Pick. 455, 464.

And, therefore, it is deemed a penalty if it is to be paid as a gross sum for failure to keep a contract to complete a piece of work by

a given time; for that is a contract capable of several breaches of different degrees of importance. Such is the case here.

Tayloe v. *Sandiford*, 7 Wheat. 13.
Van Buren v. *Digges*, 11 How. 461.
In re Newman, *ubi sup.*

While, on the other hand, in a covenant, if the sum to be paid is graduated according to the breach (as in case of a contract to pay so much a day, if a piece of work is not finished by a fixed time), it will be liquidated damages.

Fletcher v. *Dyche*, 2 T. R. 32.
Ranger v. *Great Western Railway Co.*, 5 H. L. 72, 104, 105.
Curtis v. *Brewer*, 17 Pick. 513.

III.

There is nothing in the circumstances of this case to make the bond here an exception to the general rule.

A. The presumption that a penalty of a bond is not liquidated damages is conclusive. Even if it is not conclusive, it is well-nigh conclusive; and, in this case, the presumption from the form of the instrument is strengthened by the fact that the form is not due to any accident, but was deliberately adopted on the part of the State of Rhode Island by counsel learned in the law, as truly expressing the rights and liabilities of the parties. (Record, p. 42.)

B. The penalty of a bond is never held liquidated damages, even in cases such as *Errington* v. *Aynesley*, 2 Bro. C. C. 341, in which there was much stronger reason for so holding than there is here.

C. Even had the obligation been in the form of a covenant, the sum to be forfeited could not have been liquidated damages; for, if it had been, it would have been payable whether the road was never built, or whether it was half-built and then abandoned, or whether it was finished five days after Jan. 1, 1872. *Tayloe* v. *Sandiford*, 7 Wheat. 13; *Van Buren* v. *Digges*, 11 How. 461, and other cases cited *supra*.

D. It may be contended that this bond was called for by a statute, and that therefore the case falls within *U. S.* v. *Hatch*, *Root* v. *Patten*, and the cases mentioned by Lord Hardwicke in *Benson* v. *Gibson*. See *ante*, pp. 21–23.

But, in those cases, equity refused to interfere, not because the

bonds were statutory, but because the statutes there in question made the acts mentioned in the condition misdemeanors punishable by forfeiture of the sums named, and the bonds were therefore bonds not to commit a crime.

That is not the case here.

There is nothing in the language of this bond or in the circumstances under which it was given to indicate any intention to make the non-completion of the road a misdemeanor, and the penalty a fine.

The language is the ordinary language of contract with security, not of misdemeanor and fine.

The provision occurs in a grant of a franchise by the legislature, as representatives of the people, not in a regulation by the legislature as the sovereign law-giver in the exercise of the police power.

Boston & L. R.R. Co. v. *Salem & L. R.R. Co.*, 2 Gray, 1, 32.
Brewster v. *Hough*, 10 N. H. 138, 146, 147.

E. It is true that, in the events which have happened, the State of Rhode Island will receive nothing under this bond, if it is not construed to be by way of liquidated damages.

But, *first*, if the Company had partially constructed this road and then abandoned it without paying the land damages, as this very Company, in fact, did in the case of the road from Woonsocket to Daysville (Record, pp. 67–72), the bond would have stood as security for those damages. For the abutters could, by obtaining leave from the Treasurer, have put the bond in suit in his name for their benefit. *Skinner* v. *Phillips*, 4 Mass. 68.

And, *secondly*, it by no means follows from the fact that the effect of construing the bond to be by way of security is construing it to be, in case of a breach, of little practical value, that such construction is not the true one.

The same fact is true of the bonds in many of the cases cited.

The answer to any argument based on this circumstance is best made in the words of Lowell, J., in giving judgment in this case in the Circuit Court (Record, pp. 77, 78): "The statute provides for a bond, and a bond was given; and it has been the law of the several States and of the United States from the beginning that the penal sum of a bond is never liquidated damages, but only security for such damages as may be due, 'according to equity,' to quote the Act of Congress, Rev. Sts., § 961. I feel the force of the argument that

the State of Rhode Island must have known that they never could prove actual damage in a case of this kind; and, therefore, they must have intended this sum to be something payable absolutely. But, to the legal mind, the answer is conclusive that they required a bond, and must have known that the penal sum of a bond is never liquidated damages. Taking a well-known security, they must have taken it for what it is; and there is no reason to speculate upon the motives which induced their action, or upon the contingencies in which some damage to the State might possibly have accrued. We know, as a matter of fact, that people are constantly in the habit of annexing penalties to their contracts, such as charter parties; and even the courts continue to do it in writs of injunction, and yet the penalty has no effect whatever on the rights of the parties, but is a mere piece of surplusage. It is impossible to hold that this sum of $100,000 was liquidated damages to be paid by the Company upon a breach of the bond, whatever the breach may have been." And see 2 Sedgwick, Meas. Dam. (7th ed.), 259, note, cited p. 25, *ante*.

DAMAGES.

As the $100,000 are not liquidated damages, the burden is on the State of Rhode Island to prove what damages it has sustained. *Austin* v. *Moore*, 7 Met. 116; *Leonard* v. *Whitney*, 109 Mass. 265. No such proof has been made.

The strongest argument of Clark and of the State is that not only no such damage has been proved, but that no such damage can be proved. The alleged impossibility of proving actual damage is their main ground for holding that the penalty of the bond must be paid in full.

It appears by the record that there was no damage. The suit was originally brought against Samuel Clark, Treasurer of the State of Rhode Island. Counsel, under instructions from the State (Record, p. 44) and paid by it (Record, p. 62), appeared and defended the suit on the ground that it was in truth a suit against the State. These counsel agreed to a statement of facts that there was no "evidence of any damage accruing to the State of Rhode Island, or any citizen thereof, under said Act, or anything done or omitted to be done thereunder" (Record, p. 23). This concludes Samuel Clark.

Judge Shepley, by his interlocutory decree of April 15, 1878,

which was not shown to counsel, ordered that Clark might have sixty days in which to file evidence; but this arose from the learned judge's not sufficiently observing and considering the terms of the agreed statement. The order cannot affect the distinct admission of the statement.

But it may be said that the State of Rhode Island is not bound by this statement.

The only thing done by the State in the suit has been to file its claim (Record, p. 51), and to appeal from the final decree (Record, p. 54). All of the evidence was taken by Clark, none by the State (Record, p. 57); and the claim by the State was, in fact, not filed till about two years after the evidence was closed (Record, p. 51).

The State is in this dilemma. It has either filed no statement and produced no evidence, in which case the plaintiffs are entitled to a decree against the claim of the State as on their unanswered bill; or it must be taken to have adopted the proceedings of its Treasurer, Clark.

The first view is perhaps technically the most correct; but it undoubtedly does not express the intention of the parties, and it would be hardly fair for the plaintiffs to insist on it. They do not insist on it. They admit that the State can step into the position of Clark as to the truth of any facts appearing on the record. Any facts which on the record it is open to Clark to affirm, the State can affirm; any facts which on the record it is open to Clark to deny, the State can deny. But it cannot approbate and reprobate, it cannot adopt the facts which it wishes and reject those which it dislikes. It either has no allegations and no evidence in support of its claim, or it is bound by the agreed facts.

This works no injustice; for what can be a more convincing demonstration that there is no evidence of damage than this admission by the learned and careful counsel of the Treasurer (who were also the counsel of the State, Record, p. 51) that there is none. It is clear that counsel went through the form of taking a little evidence, not because they believed there was any proof (for their main reliance has always been that no such evidence was attainable), but out of respect to Judge Shepley's improvident order.

Therefore neither Clark nor the State has any right to go into evidence, at all; and the rest of the brief is (if we may so say) submitted under protest.

Even if the defendant was at liberty to introduce evidence, the evidence introduced was either not competent to prove that the State of Rhode Island really sustained any damage, or, being competent, failed to prove that it had done so.

The defendant has offered evidence which we suppose is intended to show: (A) That the railroad, if built, would have increased the value of the property taxable by the State; (B) That the passing of the bill granting permission to construct the railroad consumed the time of the legislature; (C) That the State has expended money in defending this suit.

A. *Evidence that the railroad, if built, would have increased the value of the property taxable by the State.*

I.

That fact, if proved, is incompetent.

1. The taxes on railroads are imposed by the several towns through which the road passes, not by the State. This is shown by the evidence introduced by Clark, and by the case of *Providence & Worcester R.R. Co.* v. *Wright*, 2 R. I. 459. In that case, a tax was assessed by a town under the general law (which has remained the same) for the taxation of real estate, on the land which the plaintiff corporation owned in fee, and over which it had an easement,— "being the location, sleepers, rails, bridges, etc.," — situate within the town; and it was *held* that the property was taxable by the town.

2. The increase of the taxable property within a State is no pecuniary benefit to the State. The greater the amount of property, so much the greater, in contemplation of law, is the expense and care of protecting it.

II.

Admitting that the fact is competent, it was not proved that the building of the road would have increased the amount of taxable property at all; or, if it would, what the increase would have been.

No evidence that the taxable property would have been increased at all.

The evidence was of the cost of building a railroad. The tax is imposed by the several towns through which the railroad

passes, on the real estate thereof situate within its limits. *Providence & Worcester R.R. Co.* v. *Wright, ubi sup.*

A large portion of the cost of building a railroad is the price paid for the land. So far as the amount so expended is concerned, the taxable property of the town in which the land lies is no more increased than it would have been by a private sale of the same land.

The building of a railroad, therefore, increases the taxable value of land only so far as the land is of greater value as it stands with a railroad built on it than it was as it stood fit for agriculture or with a building erected on it.

And, in estimating the value of the several pieces of the road situate in each town, it is to be remembered that it is the value of those pieces of land in their present condition, not the value of the franchise that is being taxed.

In this case, it may be that the land over which the road in question would have passed is more valuable as it was and is to-day than it would have been, had the railroad been built. It may be that originally it was fertile land, and therefore more valuable for agriculture than encumbered by a railroad track. It may be that the land has since been improved by the erection of factories, and is therefore more valuable.

No evidence how much the taxable property would have been increased.

Clark undertook to make proof of the taxable value by proving:

The length, valuation, and taxes imposed upon the Providence & Worcester Railroad Company from 1872–1877 inclusive.

The length of the road here in question.

The cost of the road here in question.

But, *First*, had the State proved each of these facts, there would have been no proof how far the taxable property would have been increased, or that it would have been increased at all.

1. No data are given from which to calculate how much of the taxes paid by the road would have been clear gain to the several towns, and how much would have had to be deducted in estimating the gain for increased expenditure caused by the necessity of protecting the property of this road.

2. The cost of the road is not connected with any other evidence, and, standing by itself, is no evidence of taxable value.

The tax is laid on the actual value of the land as it stands,

covered by rails, bridges, etc. *Providence & Worcester R.R. Co.* v. *Wright, ubi sup.*

The increase of taxable property caused by the building of this road is the difference between the value of the land with the railroad built on it, and the value of the land as it was and is.

The cost of the road is no evidence of that increase.

The largest item in the cost of a railroad is the money paid for land damages; *i.e.*, buying the land; but that does not go to increase the value of the land.

Setting aside the value of the land, the cost of the superstructure is no evidence of its value. It is matter of common knowledge that a railroad often costs more than it is worth for taxation or any other purpose.

3. The valuation of the taxable property of one railroad is no evidence of that of another.

A clearer case of evidence, which is *res inter alios acta*, and too remote, cannot be readily conceived.

One railroad might have in the State (the lines of both these roads were located both within and without the State) large car-building shops, machine shops, and repair shops, and the other none; one might have an expensive station at its terminus, the other a cheap one; one might have a single, and the other a double track or a narrow gauge track, and so on through all the details of the fixed equipments of a railroad.

The land through which one might pass, and in which one might have its terminus and stations, might be valuable; and that in which the other had its stations, etc., waste land. Still less can the taxable value of one railroad in one town be evidence of the increase of the value arising from the building of another railroad in another town.

Secondly. With the exception of the valuation and taxes imposed on the Providence & Worcester Railroad Company, the State of Rhode Island has not proved one of these three evidentiary facts. (And the fact of this valuation was not legally proved: the assessor's lists are the best evidences of the valuation and taxes assessed.)

1. It did not prove the length of the road in question. It got John W. Ellis to guess at it, but nothing more. Ellis testified that

he had been for seven years the civil engineer of the Providence & Worcester Railroad Company, and that the length of that line was "seventeen and six-tenths miles"; and then, without any preliminary testimony, the location of the present road was read to him, and he testified: "As well as I can judge, it would be a little more than seven miles." See Record, p. 60.

2. It did not prove what it would have cost to build this road.

Jesse Boynton (see Record, p. 61) testified that his principal business had been for the last seven years building railroads; and then, without any other preliminary testimony, testified, on being asked what the expense per mile of building the road in question would have been: "I can't give a definite answer to that question. I could only give an approximate answer. I should say about $30,000 a mile at that time would be the approximate cost."

That parties should seriously contend that they have proved themselves entitled to the payment of money, and of a specific amount of money, on such remote and indefinite testimony as the above seems impossible.

B. *Evidence that the time of the Legislature was consumed in discussing and passing this bill.*

1. That fact is not relevant. The expense of the time so consumed is not damages arising from the non-completion of the road. The expense of time was incurred in the interest of the State, to determine whether it would, or would not, be for its advantage to make this grant. It was not incurred in the interest of the Boston, Hartford & Erie Railroad Company. Further, the time was not consumed by this Company, but by the Boston & Providence Railroad Company, in opposing the grant. (See deposition of Abraham Payne, Record, p. 63.)

2. The method of proof was incompetent. The best evidence that the time of the Legislature was consumed in considering this bill was an office copy of the journal of the Legislature. This objection was made at the taking of the deposition (Record, p. 63).

3. The proof was too indefinite to be acted on. It is not shown how many days were consumed by the Legislature in discussing this bill.

C. *Evidence that the State has expended money in retaining counsel in this suit.*

Here we at last find a fact clearly and definitely proved, but it is a fact as clearly and definitely incompetent.

The State of Rhode Island is no more entitled to recover its counsel fees here as damages arising from the breach of this contract than a party to any other contract is entitled to recover his counsel fees in a suit for breach of the contract as damages resulting from the breach.

ROBERT R. BISHOP,
JOHN C. GRAY,
Of Counsel for the Appellees.

EXTRACTS FROM STATUTES.

CONNECTICUT LEGISLATION.

Act Uniting the New York and Hartford Railroad Company with, and Amending the Charter of the Hartford and Providence Railroad Company, and changing name to "The Hartford, Providence and Fishkill Railroad Company." Passed 1849.

SEC. 1. That the New York and Hartford Railroad Company be, and the same is hereby, united with, made part of and merged in, the Hartford and Providence Railroad Company; and when said union and merger shall have been completed by an acceptance of the provisions of this act, as hereinafter provided, said two companies shall constitute one united company, with a capital consisting of the present capital of the said Hartford and Providence Railroad Company, and to be increased from time to time to a sum not exceeding the joint capital allowed to said two companies, and to be from time to time issued in the manner hereinafter provided.

SEC. 4. That the Hartford and Providence Railroad Company shall thereafter be entitled "The Hartford, Providence, and Fishkill Railroad Company"; and their present powers are so extended that they are hereby authorized to build, equip, operate, and use a single, double, or treble railroad or way between the east and west line of this State, through the towns of Plainfield and Sterling, in the direction of Providence and Fishkill, on the most direct, practicable, and feasible route, and to take and use the powers of their charter and its amendments, and of this act, for constructing the same and any other road or branch which the New York and Hartford Railroad Company is now authorized to construct; and may build the same in such sections, and expend their funds thereon at such time and in such manner as they shall deem most expedient, subject to the provisions hereinafter named. And said company may lay out their road, not exceeding six rods wide, through its entire length; and for cuttings and embankments, and procuring stone and gravel, and for depots and turnouts, may take as much more land as may be necessary for the proper construction, operation, and security of said road. And, for any other lawful uses of said road, said Hartford, Providence, and Fishkill Railroad Company may further take, in addition to the way originally prescribed by the charter

of the New York and Hartford Railroad Company, such land or real estate, within the limits, and between the eastern and western *termini* authorized by the charter of said last-mentioned company, as may be necessary therefor, not exceeding two hundred and fifty feet in width, and for a distance or distances in all not exceeding two thousand feet in length. And said company may locate their draw at the east end of their bridge across Connecticut River, and may build a branch in East Hartford to said river, at such place as may be deemed expedient; and also such other branch or branches as may be necessary to connect said road and its depots, machine-shops, and other necessary buildings, subject to the approval of the commissioners of said railroad.

Act Amending the Charter of the Hartford, Providence, and Fishkill Railroad Company. Passed 1852.

SEC. 1. That the union made by the Hartford, Providence, and Fishkill Railroad Company with the Providence and Plainfield Railroad Company, incorporated by the General Assembly of the State of Rhode Island and Providence Plantations, is hereby validated and confirmed; *provided* that the security of any and all bonds issued, and that may hereafter be issued, by or under the name of the Hartford and Providence Railroad Company, or the Hartford, Providence, and Fishkill Railroad Company, within the amount limited by their charter, and purporting to be secured by any mortgage or mortgages in this State, shall in no way be prejudiced or impaired by reason of the said union or of this resolution, but shall be and remain valid, both at law and in equity, to all intents and purposes.

Act Incorporating the Boston, Hartford, and Erie Railroad Company. Passed 1863.

SEC. 1. That Joseph W. Clark, Albert G. Farwell, James A. Dupee, Samuel P. Benson, Gilbert W. Phillips, Edward Crane, Henry Sayles, S. Augustus Dix, Alfred Smith, George M. Bartholomew, Calvin Day, Edmund G. Howe, Charles Hart, Shubael Hutchens, Orry Taft, R. M. Clark and Alonzo Milliken, with such other persons as they shall associate with them for that purpose, and their successors, are hereby constituted a body politic and corporate, by the name of the Boston, Hartford, and Erie Railroad Company, and by that name to sue and be sued, to plead and be impleaded, in any court in this State, to have and make a common seal, and the same to break, alter, or renew at pleasure, with the powers and privileges, and subject to the duties, restrictions, and liabilities, of the statute laws of this State, passed May session, 1849, entitled An Act relating to Railroads, and of the several acts passed, or that may be passed, in addition to or in alteration of said act.

SEC. 4. Said Boston, Hartford, and Erie Railroad Company may purchase, upon such terms and conditions as may be mutually agreed upon by the several corporations interested at meetings of said several corporations legally called for such purpose, the franchise, the whole or any part of the railway or railway property, of any railroad company located in whole or in part in this State, whose line, or a portion of whose line, of railway, constructed or chartered, now forms part of a railway line from the harbor of Boston, passing through Thompson to Willimantic, and from Providence through Willimantic to Hartford, Waterbury, and thence toward the North River, with the purpose of reaching a point at or near Fishkill, in the State of New York; and in case said Boston, Hartford, and Erie Railroad Company shall purchase the franchise of the Thompson and Willimantic Railroad Company, they shall complete and run the whole line between Mechanicsville and Willimantic within one year from the time they shall run over or use as a railway any portion of said line. And said Boston, Hartford, and Erie Railroad Company may make any lawful contract with any other railway company with which the track of said railroad may connect, in relation to the business or property of the same; and may take lease of any railroad; or may lease their railway to, or may make joint stock with, any connecting railway company in the line of, and forming a necessary part of, and running in the same general direction as, their said route, and between its terminal points. And in case said company shall purchase or lease any connecting railroad, they shall run trains over the purchased or leased roads in such manner as to accommodate the business and travel of said road as well as it is now accommodated. And whenever certificates, under oath, of the secretary of said Boston, Hartford, and Erie Railroad Company, and the secretary of the other contracting corporation, shall be filed in the office of the Secretary of State, showing that said Boston, Hartford, and Erie Railroad Company has purchased, and said other contracting corporation has sold, under the provisions of this act, their franchise, or the whole or any portion of their railway or railway property, then said Boston, Hartford, and Erie Railroad Company shall become possessed of the property bargained, sold, and conveyed; and all of the grants heretofore made, or that may be made (said corporation making such sale), and transferred by the vote of said corporation, shall vest, be, and remain in and to said Boston, Hartford, and Erie Railroad Company as if originally granted to or obtained by them.

RHODE ISLAND LEGISLATION.

An Act to Incorporate the Providence and Plainfield Railroad Company. Passed 1846.

SEC. 1. Benjamin Cozzens, Samuel Ames, Henry Anthony, William G. Bowen, Edward S. Williams, James G. Anthony, Shubael Hutchins, Tully D. Bowen, Abraham Payne, and their associates, successors, and assigns, be, and they hereby are, made a corporation by the name of the "Providence and Plainfield Railroad Company"; and they shall be capable in law to sue and be sued to final judgment and execution, plead and be impleaded, defend and be defended against, in any court of record, or in any other place whatever; to make, have, and use a common seal, and the same to break or alter at pleasure; to make, ordain, and establish all such by-laws, rules, and regulations for their own government, and for the management of their property and concerns, as they shall deem expedient and necessary to accomplish the designs and purposes, and to carry into effect the provisions of this act; and shall be and are hereby vested with all the powers, privileges, and immunities which are or may be necessary to carry into effect the purposes and objects of this act as hereinafter set forth; and the said corporation are hereby authorized to locate, lay out, construct, and finally complete a railroad, commencing in the city of Providence, or at such point on the railroad of the New York, Providence, and Boston Railroad Company as may be agreed upon with said company, and thence to the valley of the Pawtuxet River, and up the valley of said river on either branch thereof, to the line of the State of Connecticut, at such point as may be deemed advisable, with power to build such lateral branches to said railroad leading to such factory or factories on the branches of the Pawtuxet River, or the vicinity thereof, as may be deemed expedient, in such manner and form as may be deemed expedient. And for this purpose said corporation are authorized to lay out their road not exceeding six rods wide through the whole length; and for the purpose of cutting embankments, and obtaining stone and gravel, and of making tracks to and from their depots and car-houses, may take as much more land as may be necessary for the proper security and construction and use of said road: *provided* that all damages which may be occasioned to any person, company, or corporation by taking of such land or materials for the purposes aforesaid, shall be paid for by said corporation in the manner hereinafter provided; and said corporation may purchase and hold such real estate upon the line of said road, and such materials, cars, engines, and other things, as may be necessary for depots for the use of said road, and for the transportation of persons, goods, and merchandise.

SEC. 16. The said Providence and Plainfield Railroad Company are hereby authorized to unite with a railroad company which may be empowered by the legislature of any other State or States to continue said railroad westward; and, when the two companies shall be so united, the stockholders of one company shall become stockholders in the other company; and the companies shall constitute one corporation, by such name as the united corporation may adopt. And all the franchises, property, powers, and privileges granted or acquired under the authority of the said States respectively, shall be held and enjoyed by all the said stockholders in proportion to the number of shares or amount of property held by them respectively in either or both of said corporations; and all the powers conferred by this charter upon said corporation to be exercised by the president and directors thereof, or by their agents, and especially the power to lay out, locate, construct, and complete their said railroad and its branches, and to take and use the land and materials of persons for the site of said railroad, and for the purpose of properly constructing and securing the same, shall, upon the union of said corporation with the railroad company to be incorporated by any other State or States, be vested in the corporation to be formed by such union, to be exercised by the directors of said united corporation or their agents; the first election of the directors of said united corporation to take place on the day agreed on by the directors of the respective corporations at stockholders' meetings of said corporation, specially called by their respective directors for that purpose; said meetings to be held at the same time and place as a meeting of the stockholders of the united corporation.

An Act in Amendment of an Act to Incorporate the Providence and Plainfield Railroad Company. Passed 1852.

SEC. 1. The union made by said corporation with the Hartford, Providence, and Fishkill Railroad Company, incorporated by the General Assembly of the State of Connecticut, is hereby validated and confirmed; said united corporation to bear the said name of the Hartford, Providence, and Fishkill Railroad Company, and to have, use, exercise, and enjoy all powers, authorities, privileges, and immunities granted by the act incorporating the Providence and Plainfield Railroad Company, and the acts in amendment of the same; and especially to have, use, exercise, and enjoy, for the purpose of constructing their railroad and the branches thereof, the right and privilege of laying out their road, not exceeding six rods wide through the whole length, and for the purpose of cutting embankments and obtaining stone and gravel, and of making tracks to and from their depots and car-houses; to take as much more land or real estate as may be necessary for the proper security, construction, and use of said

road: *provided* that all damages which may be occasioned to any person, company, or corporation by taking of, or injury of, any kind of taxed real estate or material for the use of said road, shall be paid for by said company in the manner provided in the said act incorporating the Providence and Plainfield Railroad Company, and the acts in amendment of the same: and *provided further*, that nothing herein contained shall be construed to authorize the construction of said road in the city of Providence, in any way contrary to the provisions of the twenty-third section of the original charter.

An Act to ratify and confirm the Sale of the Hartford, Providence, and Fishkill Railroad to the Boston, Hartford, and Erie Railroad Company. Passed 1865.

SEC. 1. The sale and transfer of the Hartford, Providence, and Fishkill Railroad, its property and franchises, to the Boston, Hartford, and Erie Railroad Company, a corporation created by the General Assembly of the State of Connecticut, as evidenced by the deed of said Hartford, Providence, and Fishkill Railroad Company, dated the twenty-eighth day of August, 1863, and recorded in the city clerk's office of the city of Providence, in book No. 167, page 13, of the records of deeds of real estate in said city, is hereby ratified and confirmed, so far as said railroad is situated in this State; and said Boston, Hartford, and Erie Railroad Company, by that name, shall and may have, use, exercise, and enjoy all the rights, privileges, and powers heretofore granted and belonging to said Hartford, Providence, and Fishkill Railroad Company; and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this State.

And said Boston, Hartford, and Erie Railroad Company, in the transportation of freight or passengers to and from any point or place in Rhode Island to and from any point westerly of Willimantic, on the line of its railroad, built or to be built, any part of which shall be located in this State, shall not charge a greater rate for the whole distance than to and from any point or place in Massachusetts, to and from the same points or places westerly of Willimantic.